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Minding the Gap

SHMUEL I. BECHER & TAL Z. ZARSKY

Online and offline, relations between consumers and businesses are most frequently governed by consumer standard form contracts. For decades such contracts have been assumed to be one-sidedly biased against consumers. Consumer law seeks to alleviate this bias and empower consumers. Legislatures, consumer organizations, scholars, and judges constantly look for ways to protect consumers from unscrupulous firms and unfair behaviors.

While consumer-business relations are assumedly administered by standardized contracts, firms do not always follow these contracts in practice. Sometimes there is significant disparity between what the written contract stipulates and what consumers experience de facto. Interestingly, firms often deviate from the written contract in favor of consumers, thus creating a gap (the Gap). In other words, firms often take a lenient approach despite the stringent written contracts they draft. This Article examines whether, counter-intuitively, policy makers should add firms' leniency to the growing list of firms' suspicious behaviors.

This Article proposes that firms' lenient approach, coupled with online tools and human psychology, may occasionally have surprising and harmful qualities. It illustrates how technological changes can turn the Gap into a key component in consumers' understanding, or perhaps misunderstanding, of consumer contracts. It examines when firms' leniency should be considered manipulative or exercised in bad faith. It then explores whether firms should be allowed to enforce the written contract even if they deliberately and consistently deviate from it.

The main contribution of this article is threefold: First, it points to the Gap and examines its foundations and origins. Second, it illustrates how the Gap complicates the interplay between reputation, conduct, trust, and the

need to protect consumers. While it is generally believed that the Gap is harmless or even desirable, we show that it might have serious adverse effects. Third, it identifies key questions policy makers and courts should consider with respect to this Gap.

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Minding the Gap

SHMUEL I. BECHER[♦] & TAL Z. ZARSKY^{*}

INTRODUCTION

Often, firms draft one-sided or stringent consumer standard form contracts (SFCs), yet display a flexible and lenient approach to their consumers (the Gap). For instance, a vendor may stipulate a “no refund and no returns” policy, yet exhibit—at least in some circumstances—accommodating, lenient behavior. Alternatively, a firm may, in practice, accept consumers’ behavior as lawful even though such behavior is, according to the SFC, a breach of contract. Should consumer law be wary of such a practice? Are there valid reasons for prohibiting firms from exercising this form of leniency?

The gap between contractual language and corporate conduct is frequently manifested as a deviation from the written SFC in favor of consumers. At first glance, firms should be allowed, if not encouraged, to exercise leniency. For decades, many have complained about firms that exploit unequal bargaining power and information asymmetries.¹ Intuitively, therefore, contract law should not be concerned about firms’ lenient practices that seem to benefit consumers.

But, as this Article shows, the Gap between SFCs and firms’ lenient behavior sometimes mandates close scrutiny. Such a Gap may stem from a range of motivations and can have nuanced implications. The Gap may distort consumers’ perception and undermine rational decision-making. It

[♦] Associate Professor, Victoria University of Wellington—Victoria Business School. LL.M, J.S.D., Yale Law School.

^{*} Professor and Vice Dean, University of Haifa—Faculty of Law. LL.M, J.S.D., Columbia Law School.

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¹ See e.g., Friedrich Kessler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1105 (2006); Shmuel I. Becher, *Asymmetric Information in the Market for Contract Terms: The Challenge That Is Yet to Be Met*, 45 AM. BUS. L.J. 723, 725–28 (2008).

can undermine the correct allocation of risks and diminish overall efficiency. It might be unfair, as well as clash with other liberal values. Accordingly, we suggest regulating—or at least considering—not only firms’ “bad” behavior (e.g., breach) but “good” behavior (i.e., leniency) as well.

To understand why, one should consider changes the Internet has brought to the way we seek information. In the digital realm, we overvalue, and over-rely on, some types of information. Given this reality, we show below that technological tools contribute to turning the Gap into a key component in consumers’ misunderstanding of consumer contracts.

A few academics have already noted and discussed the existence of the Gap.² Nonetheless, the literature on this issue often does not address the Gap explicitly or misses its meaning in the online era. The literature further fails to consistently examine the Gap’s relation to the key issue of firms’ reputations. This Article addresses these issues and thus enriches contract law and consumer protection literature.

When it comes to the formation of business-to-consumer contracts, the law and legal academia have traditionally focused on two main components. One is the consumer’s behavior. Here, well-known questions have been addressed: When does clicking “I agree” on web browsers signal consent? Do consumers even read SFCs to begin with? And if not, can an informed minority of consumers discipline sellers?³ How should the law respond to

² See, e.g., Lisa Bernstein & Hagay Volvovsky, *Not What You Wanted to Know: The Real Deal and the Paper Deal in Consumer Contracts—Comment on the Work of Florencia Marotta-Wurgler*, 12 JERUSALEM REV. LEGAL STUD. 128, 129 (2015) (“[This comment] suggests that studies of consumer contracts in particular contexts should move from looking almost exclusively at the terms of the *paper deal* to looking at the terms of the *real deal*—that is, the way sellers actually behave in the shadow of both written contracts and the wide variety of other forces that may constrain or influence their behavior.”); Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 MICH. L. REV. 857, 858–59 (2006) (explaining what this Article refers to as “the Gap”); Stewart Macaulay, *Relational Contracts Floating on a Sea of Custom? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein*, 94 NW. U.L. REV. 775, 791–92 (2000) (commenting on Bernstein’s approach to commercial trade usage and the Gap); Eyal Zamir, *Contract Law and Theory: Three Views of the Cathedral*, 81 U. CHI. L. REV. 2077, 2100 (2014) (promoting regulation of standard-form contracts). Some authors have even started examining, sometimes implicitly, some limited facets of the relation between the Gap and the notion of reputation or opportunistic behavior. See generally Clayton P. Gillette, *Pre-Approved Contracts for Internet Commerce*, 42 HOUS. L. REV. 975 (2005); Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827 (2006); David Gilo & Ariel Porat, *Viewing Unconscionability Through a Market Lens*, 52 WM. & MARY L. REV. 133 (2010). In addition, Richard Craswell has considered the need for disclosures regarding the Gap and its usage. See Richard Craswell, *Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere*, 92 VA. L. REV. 565, 576–7 (2006).

³ For more on this question, see MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 104, 190–94 (2012) (addressing the assumptions that some consumers are informed the nature of contractual clauses while others “piggyback” on their knowledge, and that specific entities, such as watchdog groups, might be sufficient in monitoring contractual language and informing others.); Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 32 (2014) (“A central issue in these debates

the fact that consumers do not read—and are unable to understand—SFCs? The other main component that has received much scholarly and doctrinal attention is the language and form of SFCs. The central analytical questions here have been: How should courts address terms buried in boilerplate? When should a term be invalidated due to unconscionability? Should sellers be allowed to enforce unexpected SFC terms (only) if such terms are disclosed in a specific way, such as inclusion in a warning box? Should SFCs and disclosures be simplified?⁴

This Article seeks to go beyond these two sets of queries. It suggests shifting some attention from consumers to firms and from contractual language to actual behavior. This Article further opines that firms' behavior and contractual language may be intertwined and therefore should be scrutinized jointly or side-by-side. Following this logic, the Article examines whether, counter-intuitively, policy makers should add firms' lenient conduct to the growing list of firms' suspicious behaviors.

This Article is organized as follows: Part I provides the general background. The first Section explains what the Gap is. The second Section places the Gap in a broader social, commercial, and technological context, demonstrating how it complicates the interplay between technology, reputation, conduct, and law. It further explains how the Gap defies and changes the classic paradigm of consumer contract law. By doing so, we demonstrate that the prevailing view concerning the Gap is seriously incomplete. While it is generally believed that the Gap is harmless or even desirable, we show that it may have serious adverse effects.

In Part II we provide a deeper view of the Gap, examining seven possible incentives firms may have to create one. We further discuss the degree to

is the validity of the informed-minority hypothesis: the view that comparison shoppers for standard terms help sustain efficient terms in equilibrium. In this paper, we investigate the extent to which consumers actually access the terms of certain standard-form online contracts. Our clickstream data allow us to measure the informed minority with reasonable precision for the first time.”); Shmuel I. Becher, *A “Fair Contracts” Approval Mechanism: Reconciling Consumer Contracts and Conventional Contract Law*, 42 U. MICH. J.L. REFORM 747, 802 (2009) (explaining that despite being “appealing,” the informed-minority argument “is wrong for at least four reasons.”); Amy J. Schmitz, *Pizza-Box Contracts: True Tales of Consumer Contracting Culture*, 45 WAKE FOREST L. REV. 863, 875 (2010) (“This led them to question economists’ assumption that an informed minority of shoppers police fairness of contracts by spreading information regarding corporate overreaching.”); Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387, 1391 (1983) (“Consumers have incentives to become informed about important risks [associated with SFCs].”).

⁴ See Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 550 (2014) (“[Some legislatures have enacted] legal requirements [that] attempt to reduce consumers’ cost of reading the contract [and therefore simplify the process].”); Arthur Allen Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 503 (1967) (characterizing “simple form contracts” as those “with no especially striking admixtures of quasi-fraud (‘unfair surprise’) or quasi-duress (‘oppression’).”); Adam S. Chilton & Omri Ben-Shahar, *Simplification of Privacy Disclosures: An Experimental Test* (Univ. of Chi. Coase-Sandor Inst. for Law & Econ., Research Paper No. 737, Apr. 13, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2711474 (“Commentators have . . . advocated [for] . . . using simpler disclosures . . .”).

which such incentives should be considered legitimate. Part III contains five sections, each one examining one central test case that further illustrate how the Gap may be manifested. Following this, Part IV discusses policy recommendations. It proposes various possible ex ante and ex post tools to minimize the unwarranted outcomes of the Gap as well as the implications of the Gap for empirical research of standard form contracting. A brief conclusion follows.

I. THE GAP IN CONTEXT

This Part provides the necessary background for understanding the Gap and the relevance and importance of this phenomenon. Section A explains what the Gap is, presenting a concrete example. Section B connects the four cornerstones of our thesis: contract language, firms' behavior, online information flow, and the law.

A. *What is the Gap?*

Online and offline relations between consumers and businesses are governed by consumer SFCs. Despite being so commonplace, or maybe partly because they are so widespread, consumers do not read SFCs. For decades, therefore, SFCs have been assumed as biased against consumers.

In this context, one of the main objectives of consumer law is to empower consumers and level the consumer-firm playing field. Legislatures, consumer organizations, scholars, and judges constantly seek ways to protect consumers from unscrupulous firms and unfair behaviors.⁵ Recently, an old-new notion—information flow—has raised hopes of being a means to protect consumers.⁶ Information flow as a restraining mechanism is, of course, not a novel idea. But modern developments have brought a new twist to the tale.

The Internet equips consumers with a variety of new platforms,⁷ which facilitates unprecedented information sharing. Such information sharing,

⁵ For a historical overview, see NORMAN SILBER, *From the Jungle to the Matrix: The Future of Consumer Protection in Light of Its Past*, in CONSUMER PROTECTION IN THE AGE OF THE 'INFORMATION ECONOMY' (Jane K. Winn ed., 2006). For a general discussion, see JOHN A. SPANOGLE, ET AL., CONSUMER LAW: CASES AND MATERIALS II, (3rd ed. 2007).

⁶ See Shmuel I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 MICH. TELECOMM. & TECH. L. REV. 303, 306 (2008) (discussing the importance of flow of information from the ex post stage (after the contract has been formulated) to the ex ante stage (before the contract has been formulated by the relevant parties)). For a recent critical analysis and discussion, see Sofia Ranchordas, *Online Reputation and the Regulation of Information Asymmetries in the Platform Economy*, 5 CRITICAL ANALYSIS L. 127, 129–134 (2018) (discussing “the information society” and analyzing how online reviews affect reputation).

⁷ Examples of these platforms include review websites like Yelp and TripAdvisor as well as review functions on consumer websites such as Amazon.

which affects firm reputations, is now experienced at an unimaginable volume. Online information flows allow consumers to learn about businesses and their contracts efficiently and quickly. Consumers are now often informed by the impressions that other, experienced, consumers share and spread online. Consumers can learn about firms' behavior before establishing a relationship with them through the experiences that other consumers communicate.⁸

Let us now return to the basic notions of consumer law. As has been observed by many, consumers do not read SFCs as part of the "offer and acceptance" process.⁹ But given the online reality, we might argue that consumers indeed become familiar with the content of SFCs they enter through the experiences that others articulate, share, and post online. In short, peer-to-peer information flows provide the necessary information for consumers, thereby substituting for contract reading.¹⁰

Following this logic, firms that employ harsh, one-sided contract terms will undermine their reputation as the contractual language will be reflected in information flows. They will thus lose consumers to fair competitors that do not employ biased SFCs. If this is indeed the case, the law should refrain from intervening in markets where good information flow exists. In such markets, consumers will know about their SFCs even without reading them. Firms, in return, are held in check due to reputational concerns and are likely to refine their policies accordingly. As an anecdotal example, a few hours after a disgruntled consumer complained on Twitter about paying JetBlue a fee for a folding bike that fit into his suitcase, the company decided to change its (unjust) policy.¹¹ When this dynamic systematically and successfully unfolds, legal intervention may become superfluous.

But while consumer-business relations are legally administered by standardized contracts, firms do not always follow these contracts in practice. At times, there is significant disparity between what the written contract stipulates and what consumers experience *de facto*. That is, there is a crucial Gap between how firms draft their contracts on the one hand, and how firms treat consumers on the other. Interestingly, the Gap is frequently

⁸ See Kristopher Floyd et al., *How Online Product Reviews Affect Retail Sales: A Meta-Analysis*, 90 J. RETAILING 217, 217 (2014) ("Opinions posted online are thought to influence consumers' choices in a surprising variety of contexts, including airlines, telephone companies, resorts, movies, restaurants, and stocks—and utilization of online recommendations in decision-making appears to be on the rise.").

⁹ See *infra* notes 15–16 and accompanying text (explaining that the "contracting parties" are not familiar with "consumer SFCs['] [content], which [is] not read"). For a recent interesting discussion and suggestion, see Ayres & Schwartz, *supra* note 4.

¹⁰ In a different context it has been argued that "information about the exchange beyond the contract substitute for information in the contract." Zev J. Eigen, *Experimental Evidence of the Relationship Between Reading the Fine Print and Performance of Form-Contract Terms*, 168 J. INST. & THEORETICAL ECON. 124, 124 (2012).

¹¹ *A Day in the Life: Social Media*, JETBLUE: OUT OF THE BLUE BLOG, <http://blog.jetblue.com/a-day-in-the-life-social-media/> (last visited Oct. 19, 2018).

manifested by deviation from the written contract *in favor* of consumers. In other words, firms often exercise a lenient approach in spite of the stringent written contracts employed.¹²

When and where the Gap exists, consumers may discover after the fact that it was the firm's behavior—not the contract—they were learning about through these information flows. Slightly restated, firms may attempt to preserve and enhance their reputation by demonstrating lenient behavior, while employing one-sided contracts. This may have multiple challenging results.

Perhaps an example will clarify. David considers registering with a renowned dating site, hoping to find his soulmate. Before registering, David surfs the Internet. He reads feedback posted by other users. He looks at the website's testimonials. Feeling optimistic and excited about the bright and loving future ahead of him, he decides to "give it a shot."

As part of the enrollment process, David is required to provide personal information and build a profile. In his profile, David notes that he is six feet tall, twenty-six years old, and earns \$100,000 per year. Yet in fact, David's height is one inch shorter, and his annual salary is merely \$95,000. He is well aware of these facts, yet believes these small inaccuracies are a legitimate part of the dating game.

On its homepage, the dating site David chose has a link (among many other links) directing users to a lengthy terms of service (ToS) agreement. These terms note that the user (David, in this case) is prohibited from posting any incorrect information. The terms explicitly state: "The user shall not provide inaccurate, misleading or false information." Yet David does not open the link; hence, he is not aware of this term.

After dating a few mates, David receives an email from the dating site operator. The operator notifies David that he is in breach of the contract he accepted when joining the site. The operator further informs David that his account is therefore immediately terminated and his access to the website denied. The email directs David to the terms discussed above. Simultaneously, the operator cites another term: "The operator reserves the right to immediately suspend or terminate the user's access to any of the services, without notice, for any reason or no reason." Lastly, the operator reports on a complaint it received from one of the women David had dated.

¹² Our Article is concerned with one type of Gap: where the SFC is one-sided while actual behavior is lenient. Yet it is worth bearing in mind that there are other interesting gaps. One example is where the SFCs confer benefits of which only a handful of consumers become aware. The firm will not provide consumers these benefits unless they ask for them. For a detailed discussion, see Gilo & Porat, *supra* note 2. Still another type of gap is providing consumers rights and entitlements they cannot actually use. See Amy J. Schmitz, *Remedy Realities in Business-to-Consumer Contracting*, 58 ARIZ. L. REV. 213, 230 (2016) ("Substantive consumer protections and disclosure rules . . . assist consumers only to a limited extent. However, such consumer protection measures are often meaningless for the majority of consumers who lack awareness, experience, or the resources necessary to navigate traditional F2F processes for obtaining remedies.").

This woman has complained about the “false and misleading information” David posted on his profile.

David is baffled by this outcome, which leaves him quite helpless. Not only did he not read the ToS, but he also had no idea that the inaccurate information was of crucial importance to the women he dated. He was further unaware of the fact that it could lead to the termination of his account, and possible related expenses (both monetary and emotional). As noted, before entering the contract with the online dating site, David read some reviews posted by other experienced users. None of these users mentioned a similar complaint or issue. David also knows, as other users of dating sites do, that many users do not provide accurate information about their age, salary, weight, or income in their online profiles.¹³ In fact, some of his acquaintances even told him that everyone posts little white lies on their online profiles and no one really checks or cares.¹⁴

In this scenario, we are confronted with the legal question as to whether the site could lawfully terminate David’s membership. As we illustrate below, in order to answer this question, one should explore the Gap between the firm’s contractual language and actual conduct. We turn to that next.

B. *The Gap, Consumer Contracts, & the Online Reality*

Parties are generally expected to comply with contracts into which they enter. The law assumes that all parties to a contract concede that the agreed upon contract delineates and dictates their risk allocations, obligations, and rights. Traditionally, it is assumed that the contracting parties are closely familiar with the contract’s content. This, however, is not the case with respect to consumer SFCs which are not read,¹⁵ and for several good

¹³ See, e.g., DAN ARIELY, *THE UPSIDE OF IRRATIONALITY: THE UNEXPECTED BENEFITS OF DEFYING LOGIC AT WORK AND AT HOME* 218 (2010) (explaining the difficulties with online dating and suggesting that individuals will “fudge their numbers in online dating—virtual men are taller and richer, while virtual women are thinner and younger than their real-life counterparts”); Peter Holmes et al., *Can You Get Away with the Ten Most Common Online Dating Lies?*, TELEGRAPH (Oct. 13, 2015), <http://www.telegraph.co.uk/men/the-filter/11922786/Can-you-get-away-with-the-ten-most-common-online-dating-lies.html> (“[I]t comes as little surprise that a recent study found that the number-one most common lie on an online-dating profile was about height, with many male online daters adding at least an inch or two . . .”).

¹⁴ For an in-depth discussion of the different forms of lies used on dating apps, their varying implications and possible distinctions to be drawn among them, see Irina D. Manta, *Tinder Lies*, WAKE FOREST L. REV. 27 (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3229223.

¹⁵ See, e.g., Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 680 (2004) (“[C]ommentators agree that buyers, or the vast majority of them, do not read the terms presented to them by sellers.”); RICHARD A. EPSTEIN, *Contract Not Regulation: UCITA and High-Tech Consumers Meet Their Consumer Protection Critics*, in CONSUMER PROTECTION IN THE AGE OF THE ‘INFORMATION ECONOMY,’ 227 (Jane K. Winn ed., 2006) (“It seems clear that most consumers—of whom I am proudly one—never bother to read these terms anyhow: we know what they say on the issue

reasons.¹⁶

From an economic perspective, the “no reading” problem of consumer contracts facilitates a classic market failure of asymmetric—or imperfect—information.¹⁷ Drafters may take advantage of consumers’ inferiority or ignorance and draft biased contracts.¹⁸ As a result, SFCs are often regarded with distrust by various facets of society. Thus, courts and legislatures are called upon to protect consumers from egregious and one-sided contractual terms.¹⁹

So far, contract and consumer law has focused on situations where firms draft unfair contract terms. The natural assumption here, of course, is that the parties are expected to follow the contractual language. If the firm drafts a fair contract and adheres to it, there is no need for legal intervention. Furthermore, if the firm drafts a fair contract but does not adhere to it, the consumer will have the right to sue the firm for breaching the contract. But what if the firm drafts an unfair contract, yet *at times* deviates from it in favor of consumers, thus exhibiting fair conduct toward them? In the following matrix, one rubric has somewhat escaped the scrutiny of mainstream legal analysis.

of firm liability, and adopt a strategy of ‘rational ignorance’ to economize on the use of our time.”); Lewis A. Kornhauser, Comment, *Unconscionability in Standard Forms*, 64 CAL. L. REV. 1151, 1163 (1976) (“In general the consumer will not have read any of the clauses, and most will be written in obscure legal terms.”).

¹⁶ See Shmuel I. Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 LA. L. REV. 117, 172 (2007) (“This reality, in turn, creates a market failure that results from sellers’ race-to-the-bottom since it provides contract drafters with a profit incentive to include low quality (non-salient) terms in their pre-drafted forms.”); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 446–50 (2002) (providing economic, behavioral, and social reasons for consumers’ general failure to read boilerplate contract terms); Debra Pogrud Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J.L. & BUS. 617, 617–20 (2009) (discussing consumer contracts that are designed in ways to deceptively prevent consumers from being able to bring what would otherwise constitute valid causes of action).

¹⁷ Shmuel I. Becher, *Asymmetric Information in the Market for Contract Terms: The Challenge That Is Yet to Be Met*, 45 AM. BUS. L.J. 723, 735–36 (2008).

¹⁸ Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1278 (2003).

¹⁹ Since SFCs are adhesion contracts frequently offered on a take-it-or-leave-it-basis, we focus on and analyze these contracts as an example. For a seminal article that calls to protect offerees who enter adhesion contracts, see Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174 (1983).

Table 1: SFCs and Firms' Actual Behavior

| <i>Firm's Behavior</i> <i>Firm's SFC</i> | Harsh | Lenient |
|---|-------------------------------------|--------------------------|
| Harsh | Legal intervention may be justified | ??? |
| Lenient | Breach of contract | No intervention required |

Should the law be concerned with firms' lenient behavior? Even with respect to unfair or harsh contracts, courts' willingness to intervene is context-dependent. One of the main factors that deters courts from intervening is the problem of ex post fair and efficient allocation of rights. Courts and other legal entities may find it difficult, even impossible, to rewrite SFC terms to replace those that are struck down.²⁰ For that reason, it is important to seek out possible substitutes for blunt, ex post legal interventions whenever possible.

Another important factor that may diminish courts' tendency to intervene in SFCs is reputation. Following this line of reasoning, before yielding to legal intervention, the role of reputation ought to be considered.²¹ In essence, reputational constraints may discipline sellers and incentivize them to behave fairly with consumers. If sellers are concerned about their positive reputation, they may fear that executing biased SFCs will undermine it.

In this respect, reputation complements and possibly even replaces ex ante reading. Rather than being deterred by the (non-existent) reading consumers, firms are deterred by the "gossiping" ones. The latter will be quick to share any disappointments or misfortunes with fellow consumers. For instance, a New York hotel has tried to preserve its reputation by fining guests \$500 for negative reviews posted online. However, after applying this policy, consumers complained, the story went viral, the hotel's rating plummeted, and the hotel ended that policy.²²

Thus, firms that wish to maintain a solid reputation have strong incentives to conduct themselves fairly. As a result, they will be unwilling

²⁰ Cf., Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 592 (2003) (cautioning against willingness of courts to admit extrinsic evidence for purposes of illustrating a shift in a given contract's meaning).

²¹ See, e.g., EYAL ZAMIR & DORON TEICHMAN, BEHAVIORAL LAW AND ECONOMICS 306–13 (2018) (discussing market solutions and reviewing the role of reputation).

²² Jackie Huba, *Lessons From the Hotel That Fines Customers \$500 for Negative Online Reviews*, FORBES (Aug. 4, 2014, 3:16 PM), <https://www.forbes.com/sites/jackiehuba/2014/08/04/lessons-from-the-hotel-that-fines-customers-500-for-negative-online-reviews/#5e618cc179c5>.

to use or capitalize on one-sided contractual provisions buried in an SFC that no one reads. This, in short, may ensure that sellers have a sufficient profit incentive to interact fairly with consumers. Therefore, online platforms that facilitate robust peer-to-peer information sharing have an important potential from consumers' perspective—they can significantly reduce the risks involved in contracting and the need for taking legal precautions.

For reputation to be an effective incentive, it is imperative that sellers' reputations might potentially be compromised by biased contracts and actions. This might indeed occur thanks to the previously noted digital and online information flows. Until the emergence of the digital age, the traditional information flow that consumers generated was rather partial in scope, limited to relatively few close friends and relatives.²³ Nowadays, individuals generate an enormous amount of content, frequently designed to be used by peers. It seems that online information flow disperses information with significant efficiency and accessibility.

Such peer-to-peer flows facilitate a rich and influential distribution of potentially high quality and accurate information for a variety of reasons. First and foremost, peer-to-peer information sharing may seem an innocent and objective way of communication. Individuals, therefore, tend to openly rely upon such information. Unlike firms, most consumers presumably post their feedback and reviews with no hidden agenda.²⁴ Consumers share their experiences with no financial incentive, at least vis-à-vis other consumers.²⁵ Consumers who communicate their perspectives online are not trying to manipulate or exploit other consumers. Moreover, sharing information online is part of a larger feature of increased trust among individuals. On top of that, humans tend to follow others' behavioral patterns and social norms (conformity bias or herd behavior) which are frequently conveyed via these online information flows.²⁶ Last but not least, the aggregation of numerous consumer reviews into one overall score provides consumers with intuitive

²³ The basic idea was perhaps most famously studied by Robin Dunbar, lately becoming known as "Dunbar's number" and cited by popular books and the media. See, e.g., Robin Dunbar, *Neocortex Size as a Constraint on Group Size in Primates*, 22 J. HUM. EVOLUTION 469, 469–93 (1992) (discussing study findings that indicate there is a maximum number of stable social relationships that primates can maintain). For an accessible further discussion, see MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS MAKE A BIG DIFFERENCE*, 177–81, 185–86 (2000). For an interesting and accessible media review, see Maria Konnikova, *The Limits of Friendships*, NEW YORKER (Oct. 7, 2014), <https://www.newyorker.com/science/maria-konnikova/social-media-affect-math-dunbar-number-friendships>.

²⁴ See *Google is Dominating the Review Market*, REVIEWTRACKERS, <https://www.reviewtrackers.com/online-reviews-survey/> (last visited Sept. 7, 2018) (explaining recent trends in online consumer reviews).

²⁵ See *id.* (explaining that the popularity of review platforms is driven by "customers' genuine desire to engage with businesses").

²⁶ See, e.g., Solomon E. Asch, *Opinions and Social Pressure*, in READINGS ABOUT THE SOCIAL ANIMAL 17–26 (Joshua Aronson & Elliot Aronson ed., 2011) (considering how "group pressure" affected individuals in experiments).

and handy information. In a way, it exempts them from the tedious tasks of reading and analyzing the abundant information. Thus, it economizes consumers' scarce attention. Given this background, peer-to-peer information flow becomes very noteworthy for retailers, as it is a central information source for potential consumers.

Indeed, online consumers share their experiences all over the net, using various technologies and methods of online information distribution.²⁷ Blogs, social networks, online forums, Twitter, and other tools allow consumers to share their experiences, thoughts, and impressions with numerous potentially interested people. By posting and sharing their experiences, knowledgeable and educated users (*ex post* consumers) can inform other inexperienced users (*ex ante* consumers). For instance, a consumer who contemplates dining at a given restaurant or lodging at a hotel can often find abundant reviews posted (on sites like TripAdvisor and Yelp) by others who have experienced the place. Likewise, a consumer who considers purchasing running shoes on Amazon is likely to find plenty of reviews and ratings provided by other experienced shoppers.

This dynamic of information flow is enhanced not only by technology, but also by a social shift to a culture of information gathering and sharing. Technology enables consumers to share their experiences in a very friendly and inviting way, and the public has been sure to follow. At the same time, technology enables consumers to seek and find information easily and inexpensively by using search engines and social networks. This trio—technology, sharing, and gathering—creates a new reality in consumer markets, with important policy and legal implications.

In the context of consumer contract law and theory, information flows may have significant value with respect to reputation. As part of this general feature, users generate, among other things, information flows pertaining to contractual aspects. At times, information flows may therefore allow prospective consumers to become informed about the transactions they are considering and the contracts that govern them. Consumers can learn a great deal about them merely by conducting a simple search and a short read. This, at least theoretically, greatly empowers consumers, providing them with information and market power they have never held.²⁸ This might imply less need for intervention in SFCs by regulators and courts.

Nevertheless, consumers' empowerment in this specific context is not yet to be celebrated. Information flows do not necessarily promote information about the contract *per se*. To be precise, there are two kinds of information flows. The first concerns information regarding the written contract. This flow is generated by people who discover and share, *ex post*,

²⁷ See *Google is Dominating the Review Market*, *supra* note 24 (discussing the popularity of online review platforms like Google, TripAdvisor, Facebook, and Yelp).

²⁸ For a detailed account, see Becher & Zarsky, *supra* note 6.

problematic contract terms. It can also be generated by peer ventures which set out to educate the public about the contractual language.²⁹ These flows turn out to be weak and unimpressive. Studies continuously show that the general public is not interested in reading contracts, reviewing and commenting on them, or reading about them.³⁰

The second type of flow deals with information about the firm's behavior, which might pertain to contractual aspects. Apparently, this latter kind of information flow is more impressive, interesting, and noteworthy. It is this type of information flow on which we focus our attention.

In a nutshell, firms are often concerned about their overall reputation.³¹ However, online reputation apparently reflects firms' conduct, which is not necessarily consistent with their contracts. In other words, if firms conduct themselves strictly according to the contracts they draft, information flows may indeed ensure that the contractual language is balanced. That is, online information flow is most powerful with regard to governing the balance of contractual language where the firm's conduct and the contract's language are aligned. But if the two are misaligned, information flow and reputation concerns cannot potentially guarantee fair SFCs.

Firms have powerful incentives to deviate from the contract's four corners, thereby generating a Gap between contract and conduct. They may deliberately stipulate one thing in their contracts while contemplating and choosing to do something else. Frequently, firms do not use and enforce their contractual rights in specific, yet recurring, instances. In such cases, the firm's reputation or information flow pertaining to its actions does not represent what the contract states. Instead, it addresses the firm's conduct and hence, cannot contribute to the equilibrium of fair and efficient SFCs.

Reputation and online flow are weighty concepts that may reshape the law of SFCs. Acknowledging firms' motivation to create a Gap is a necessary step in understanding the force and limits of these concepts. We turn to this now.

²⁹ See, e.g., *Forced Arbitration Rogues Gallery*, PUBLIC CITIZEN, <http://www.citizen.org/our-work/access-justice/forced-arbitration-rogues-gallery> (last visited Sept. 9, 2018) (identifying several companies with mandatory arbitration clauses or class action bans). Some of the information is collected by the NGO itself. Yet much of it is reported by "active whistleblowers" who the firm actively solicit. See also *TERMS OF SERVICE; DIDN'T READ*, <https://tosdr.org/> (last visited Aug. 25, 2018) (listing many of the rights users give up by agreeing to various companies' terms of service).

³⁰ See, e.g., Bakos et al., *supra* note 3, at 1 (finding that only "one or two of every 1,000 retail software shoppers access the license agreement and that most of those who do access it read no more than a small portion.").

³¹ See Robert G. Eccles et al., *Reputation and Its Risks*, HARV. BUS. REV. (Feb. 2007), <https://hbr.org/2007/02/reputation-and-its-risks> (listing several mechanisms through which a business develops a good reputation).

II. CONCEPTUALIZING THE GAP

As noted, the Gap can be manifested when firms allow divergence from the written SFCs in a way that benefits consumers.³² Sometimes a firm's divergence from the contract's language is part of a systematic, routine course of business. In other instances, such deviation is sporadic and genuinely rare. Here, we focus on the former.³³

At this point, a preliminary fundamental question emerges: If firms have the right and the ability to enforce or follow strict terms that benefit them, why do they not do so? Put simply, why do firms give up beneficial contract terms and generate a Gap instead? And if the firm intends to exercise leniency and not follow the one-sided legalese, why not incorporate lenient contract language *ex ante*? After all, some consumers might read the contract at some point and thus the firm will benefit from such lenient language.³⁴

As the analysis in this Part demonstrates, firms have various incentives to create and use a Gap. Sections A through G below provide seven main motivations, indicating both benign and malignant reasons for generating the Gap. This discussion also shows how possible behavioral, reputational, economic, and public relation incentives interplay.

A. Enhancing Reputation

One motivation for employing a Gap is enhancing firms' reputations.³⁵ Here we refer to situations in which a firm has a given contractual right but does not insist on it in practice.³⁶ When aggrieved consumers approach vendors for relief, the vendor will first direct them to the contractual provision.³⁷ Then, the vendor will offer a consumer-friendly policy and forgo the formal, contractual rights.³⁸ This might allow vendors to manipulate consumers into thinking that they have received accommodating, perhaps even personal, treatment.³⁹

For instance, a seller may waive her right to sue a consumer or terminate

³² Occasionally, firms do not exercise the rights and powers that the SFC confers. For instance, firms may refrain from enforcing contractual rights or terminating the contract, despite their contractual entitlement to do so. For an analysis of specific examples, see *infra* Part III.

³³ Drawing the lines between the two is certainly not easy. For now, suffice it to say that further empirical and analytical work is required. We return to this point later.

³⁴ See, e.g., Shmuel I. Becher & Esther Unger-Aviram, *The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction*, 8 DEPAUL BUS. & COM. L.J. 199, 206 (2010) (arguing that, if not *ex ante*, some consumers may read the contract *ex post*, once a dispute arises).

³⁵ Becher & Zarsky, *supra* note 6, at 341–42.

³⁶ *Id.* at 341.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 342.

the contract because of a certain behavior.⁴⁰ Or, an airline may allow a customer to make minor changes to her flight ticket—such as a slight correction to one’s name so as to ensure it is aligned with the passenger’s formal name—even though she is not allowed to make any changes under the SFC.⁴¹ Since people are highly sensitive to losses,⁴² saving consumers from facing potential losses is likely to be highly appreciated.

Interestingly, substantial and detailed online information flow among consumers—as opposed to the general notions of reputation this dynamic enhances—may temper this motivation.⁴³ Theoretically, with ex post information flow, consumers may easily find out how vendors treat other customers.⁴⁴ They can learn that the vendors consistently forgo their contractual rights.⁴⁵ They can thus conclude that they are not receiving any preferable or generous treatment.

Yet from the vendor’s perspective, some reputational benefit may nevertheless be derived from such a strategy.⁴⁶ First, sellers may structure their online presence to encourage feedback,⁴⁷ but there is no guarantee that online information flow indeed features the seller’s lenient treatment. Many consumers may experience the lenient treatment yet refrain from posting information about it online due to insufficient motivation.⁴⁸ Second, even if there is online information that reveals the seller’s true (lenient) attitude, it is not always likely to reach other affected consumers.⁴⁹ Faced with a firm’s generous response to an alleged problem, some consumers will naively accept such kindness without second-guessing it online.⁵⁰ Others might be too stressed or focused on direct communication with the vendor, hoping to find an optimal solution. These consumers are not likely to attend to online

⁴⁰ See *id.* at 341 (noting that consumers “will refrain from taking various actions against the vendor on learning of their limited entitlements according to the SFC they previously accepted.”).

⁴¹ *Id.* at 315.

⁴² Loss aversion is perhaps the most fundamental insight suggested and studied in behavioral economics. It stands at the heart of prospect theory, which was originally developed by Amos Tversky and Daniel Kahneman. See, e.g., Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263, 265, 269 (1979). For discussions of the interesting legal implications of loss aversion, see EYAL ZAMIR, *LAW, PSYCHOLOGY, AND MORALITY: THE ROLE OF LOSS AVERSION* 233 (2015) and Eyal Zamir, *Loss Aversion and the Law*, 65 *VAND. L. REV.* 829, 830 (2012).

⁴³ Becher & Zarsky, *supra* note 6, at 342–44.

⁴⁴ *Id.* at 342.

⁴⁵ *Id.* (“In the online setting, consumers can easily find out that they are not receiving any preferable treatment from the vendor when it ‘graciously’ decides to depart from the strict provisions of its SFC.”).

⁴⁶ See *id.* at 342 n.169 (observing that vendors “risk only minimal reputation damage, as very few consumers actually read and internalize SFCs ex ante”).

⁴⁷ See *id.* at 348 (noting that vendors have “many incentives” to do so).

⁴⁸ This may be because such instances are not likely to be part of the main, central consumer experience for which consumers are likely to post feedback.

⁴⁹ Becher & Zarsky, *supra* note 6, at 324, 326.

⁵⁰ See *id.* at 346, 355–56 (exploring reasons consumers may be unlikely to engage with online reviews or other online information sources).

reviews.⁵¹ If consumers do not comment on sellers' positive behavior, or if they are unlikely to read such comments even if posted, the Gap strategy may indeed enhance a seller's reputation.⁵² However, if this strategy is widespread, consumers will be unimpressed by the firm's lenient behavior, as they will view it as a common and even expected practice.⁵³ Therefore, in some instances and perhaps over time, this motivation will be of limited force.⁵⁴

B. *The Ex Post Chilling Effect*

The mere inclusion of one-sided provisions may have an ex post "chilling effect" on a significant segment of consumer complainers.⁵⁵ According to this reasoning, faced with such provisions, some aggrieved consumers will avoid taking legal or reputational action against the vendor.⁵⁶ These consumers will display a passive and sometimes naïve approach due to their limited entitlements according to the SFC.⁵⁷ At the same time, other aggrieved consumers will not be deterred by the contractual language. To these consumers, the firm will show leniency and not insist on following the written terms. Importantly, for the chilling effect to materialize, it is not necessary that consumers actually read, ex post, the SFC.⁵⁸ Rather, it is sufficient that the seller points to the relevant contract terms.⁵⁹

As with the foregoing motivation, online information flow among ex post consumers may render this incentive less compelling. When suitable information flow exists, consumers may learn that vendors ultimately waive their contractual rights. Hence, consumers who learn about the actual reality

⁵¹ See *id.* at 318–19 (discussing impediments consumers face in expressing complaints).

⁵² See *id.* at 338–39 (emphasizing that participation in online feedback is constrained by accreditation and motivation issues).

⁵³ See *id.* at 342 (identifying the ease of determining the vendor's practices through information available online).

⁵⁴ See *id.* at 344 (observing that "[t]he success of online watchdog groups in the political arena might not easily translate to similar success in the realm of commerce and [Business-to-Consumer] transactions").

⁵⁵ *Id.* at 342.

⁵⁶ *Id.* at 341.

⁵⁷ Cf. Dennis P. Stolle & Andrew J. Slain, *Standard Form Contracts and Contract Schemas: A Preliminary Investigation of the Effects of Exculpatory Clauses on Consumers' Propensity to Sue*, 15 BEHAV. SCI. & L. 83, 91 (1997) (studying the deterrent effect of certain contract clauses on consumers' likelihood of taking action); Meirav Furth-Matzkin, *On the Unexpected Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market*, 9 J. LEGAL ANALYSIS 1, 2 (2017) (exploring likely effects of contract terms on consumers' perceptions of their legal rights).

⁵⁸ It is worth noting that ex post reading may occur significantly more frequently than ex ante reading. See Becher & Unger-Aviram, *supra* note 34, at 206 (noting the trend in scholarship supporting this conclusion).

⁵⁹ Along these lines, a recent study of leasing agreements has found a substantial presence of non-enforceable provisions, the inclusion of which could be explained under this theory. Furth-Matzkin, *supra* note 57, at 40.

need not be so intimidated by the language of the SFC. With this kind of information in hand, consumers will feel more confident to demand more consumer-friendly treatment from the vendor.

Nonetheless, online information flow may weaken the incentive, but it does not eliminate it altogether. The threatened consumer does not always know to what degree the online information flow is representative. She may not know how exactly the firms' policy works. Therefore, some consumers—especially vulnerable ones—might still be intimidated by the SFC's language. Thus, this chilling effect might indeed play a part in a vendor's decision to create and employ a Gap.

C. *Sorting Out Bad Consumers Ex Ante*

Some consumers do read SFCs or parts of them, especially when the stakes are high.⁶⁰ In some instances, consumers may consult a lawyer, who will convey the meaning of the fine print. Other consumers may become familiar with an SFC's terms after the seller's representative or marketing materials point to key provisions. On the assumption that some consumers become aware of at least some SFC terms, the Gap might serve as a signal and screening mechanism. This can be the case when firms stick to the strict contractual language exclusively when dealing with opportunistic consumers. If the relevant information flows reflect this behavior, opportunistic consumers will be less likely to engage with the firm.

In such a case, the Gap may be helpful not only for the firm, but also to good-faith and non-opportunistic consumers. It can serve as a positive signal, indicating that the firm upholds the contract only against opportunistic consumers.⁶¹ Therefore, good-faith consumers will not be deterred by the harsh SFC at stake.⁶² At the same time, the contractual language functions as a deterring signal for problematic players who become aware of the SFC's content.⁶³ As a result, the Gap can attract good customers and deter bad ones.

Professors Richard Posner and Lucian Bebchuk offer—albeit in a somewhat different context—an illustration of such screening, while referring to the SFC between a publication and an author.⁶⁴ Assume the SFC

⁶⁰ See Becher & Unger-Aviram, *supra* note 34, at 223 (finding that the cost of the transaction at stake is the most important factor in determining whether consumers will read SFCs).

⁶¹ See Bebchuk & Posner, *supra* note 2, at 833 (observing that firms may, as a result, treat consumers better than their contracts would otherwise require).

⁶² Sophisticated consumers may even infer that the SFC at stake deters some bad-faith consumers. So, good-faith consumers may also conclude that there are no cross-subsidies; that is, that the SFC is not over-priced due to bad-faith or opportunistic customers.

⁶³ Opportunistic consumers may become aware of the SFC by reading it, as well as by asking the seller about it, or by the seller's representation, which may highlight some contractual aspects.

⁶⁴ See Bebchuk & Posner, *supra* note 2, at 830–31 (offering an example of a contract provision between an author and Harvard University Press).

stipulates that the publication can pull the plug on a project that is going wrong. A sophisticated author, who believes in his manuscript and knows he has no intention to engage in problematic behavior, should be happy to accept this SFC. At the same time, it might scare inadequate authors away.

Here, one might wonder whether good-faith authors too might be deterred by the harsh language of the SFC. That is, some authors might opt not to enter the contract after reading it (or learning about it via information flows) because of its harshness. Authors may fear that even a mild disagreement with their editors will be harshly viewed and lead to unilateral termination. True, an author might be aware of the Gap (through the noted information flows) and thus conclude that the publication's behavior is not so rigid in practice. Nevertheless, she might fear that the policy will change, and that the Gap she relies on *ex ante* will no longer exist *ex post*.⁶⁵ Therefore, applying this strategic move might not seem to be the best idea.

However, from the firm's perspective this problem seems minor. While few "good authors" may read the lopsided contract, they can nevertheless be persuaded to enter the SFC at stake. Online information flows, or the firm's agents, friends, or colleagues, are likely to allay their fears. They may explain to the author that these harsh terms are seldom imposed. They may equally provide convincing anecdotes to relax the good author's concerns.⁶⁶

Of course, screening and signaling can occur only where consumers are aware of the SFC's content. If consumers are unfamiliar with the contract's scheme, they will not be able to factor it into their decisions. Another presumption here is that the vendor will indeed enforce the contract solely on bad-faith customers. This brings us to the next possible motivation.

D. "Trouble-Makers" & an "Opportunistic Retreat" *Ex Post*

Section C notes the way firms may use the Gap to deter opportunistic consumers *ex ante*. However, the Gap may be a consequence of—or serve as—an *ex post* screening tool as well (that is, after the contract was signed and during the course of performance).⁶⁷ At times, firms might be able to distinguish different types of consumers. This ability allows firms to treat different consumers differently, while generating the Gap and benefiting

⁶⁵ Similarly, a consumer might fear that she will be considered as a problematic or an opportunistic customer.

⁶⁶ For an example of the strong influence of personal stories and narratives, see Paul Slovic, *The More Who Die, the Less We Care*, in *THE IRRATIONAL ECONOMIST: MAKING DECISIONS IN A DANGEROUS WORLD* 30 (Erwann Michel-Kerjan & Paul Slovic eds., 2010) (introducing the paradox that while people respond "strongly to aid a single individual in need," they can fail to adequately address large scale problems partially because "as numbers get larger and larger, we become insensitive").

⁶⁷ See R. Ted Cruz & Jeffery J. Hinck, *Not My Brother's Keeper: The Inability of an Informed Minority to Correct for Imperfect Information*, 47 *HASTINGS L. J.* 635, 674 (1996) (discussing how consumers can react when they read their contracts and warranties).

from it. This Section explains the two facets of this idea.

When a firm's deviation from a contract's language is tailored to a specific individual, this conduct constitutes *ex post* discrimination.⁶⁸ Such dynamics unfold where assertive consumers obtain relief or preferable treatment after a dispute or when a problem arises. At the same time, ordinary consumers will not receive preferential treatment.⁶⁹ Here, the firm *employs* the Gap to award assertive consumers.

For example, a seller's return policy states that an item cannot be returned once its original box or wrap has been opened. Two consumers buy from that seller a fan, to be used for their bedroom. They open the box, plug in the fan, and discover it makes too much noise. Note, however, that the fan is not faulty, and no misrepresentation regarding noise has been made.

The two consumers attempt to return the product. The seller denies the first consumer's request based on its return policy. Faced with such a response, the consumer realizes there is not much else that can be done. On the other hand, the second consumer is clearly not happy with the seller's attitude and is more vocal and assertive, threatening to post a negative review online, complain to consumer organizations, protest outside the premises, or may even demand to talk with the firm's CEO.⁷⁰ Neither consumer has any legal right to return the item under the contract. Nevertheless, the store realizes that the second consumer poses a reputational threat, and thus grants relief.

As this example shows, consumers who do not pose a threat to the firms' revenues and reputation will not receive lenient treatment. Firms may be motivated to treat a passive, weak, unprofitable or uninformed consumer in accordance with the stringent SFC. Conversely, assertive and informed consumers will receive mild treatment to mollify their complaints and dissatisfaction.⁷¹ This facilitates—and is facilitated by—the Gap.

Again, information flow may undermine a firm's ability to discriminate *ex post*.⁷² The flow undercuts the firm's ability to employ the Gap to benefit sophisticated consumers. With the information flow in place, consumers can educate themselves as to the circumstances in which the firm reveals leniency. Moreover, from the firm's perspective, it may often be hard to envisage which consumers will voice their disappointment online. In other

⁶⁸ *Id.* For a discussion of how big data allows firms to further distinguish different consumers, see Amy Schmitz, *Secret Consumer Scores and Segmentations: Separating Consumer "Haves" from "Have-Nots"*, 2014 MICH. ST. L. REV. 1411, 1425–26 (2014).

⁶⁹ For anecdotal evidence that almost everything can be negotiated or re-negotiated when consumers display an assertive approach, see Johnston, *supra* note 2, at 876.

⁷⁰ See, e.g., Rory Van Loo, *The Corporation as Courthouse*, 33 YALE J. ON REG. 547, 574 (2016) (footnote omitted) ("Consumers denied redress by a customer service representative can appeal to higher authorities within the organization, even sometimes obtaining redress by writing directly to the CEO.").

⁷¹ See *id.* (discussing means of redress available to consumers who assert them).

⁷² See *id.* (highlighting ways in which information flow can cause negative consumer reaction, altering firm behavior).

words, a firm may find it hard to predict how damaging any single interaction will prove to be.

Returning to the example above, at times it may be difficult for sellers to predict which (if either) of the two consumers will post a grievance regarding the store's return policy online. While firms may sometimes be able to profile and categorize consumers, in other instances, firms would prefer to avoid this speculation. Consequently, online information flow induces firms to be more cautious in their treatment of seemingly uninformed consumers. Moreover, the risk becomes even greater once we consider the potential public distaste for the practice of ex post discrimination. In other words, the risk of generating a negative information flow and criticism regarding the employment of discriminating practices should have a restraining role.

However, firms may be able to effectively profile consumers and single out the most "damaging" ones by engaging in big data analysis and employing computer algorithms and other strategies. This has proved successful in predicting consumer traits and preferences in various contexts.⁷³ For instance, firms can consider consumers' social networks in deciding how to treat requests and handle complaints. As Van Loo notes, firms "are also integrating into their business decisions means of assessing a consumer's online social influence over peers, such as the number of Twitter followers or Facebook friends."⁷⁴

Where firms can successfully exercise tailored ex post discrimination, a negative distributive problem arises. Here, uninformed and weak groups of consumers are subject to the strict SFC. At the same time, sophisticated and informed groups are treated more forgivingly or generously. Thus, the firm's behavior may cause wealth transfer from weak to strong consumers. Alternatively, it may cause wealth transfer from consumers to firms and decrease overall welfare. In addition, such dynamics counter basic intuitions of positive fairness (which is often a proxy for normative fairness).⁷⁵

There is yet another facet for using the Gap ex post. Firms can also use an SFC's one-sided terms as a way to *deal*—somewhat punitively—with opportunistic consumers.⁷⁶ For example, let us return to David and the online

⁷³ See, e.g., Ariel Porat & Lior J. Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 MICH. L. REV. 1417, 1476–77 (2014) (observing the "economic momentum" of big data and its applications in many areas of the law).

⁷⁴ Van Loo, *supra* note 70, at 565; *id.* at 549 ("Bank of America recently developed big data software that considers the wealth of family members in deciding how to handle a customer's request for a fee waiver.").

⁷⁵ See Ronen Perry & Tal Z. Zarsky, *Queues in Law*, 99 IOWA L. REV. 1595, 1603–4 (2014) (explaining the relationship between positive and normative fairness, as well as other attributes of positive fairness); Zamir, *supra* note 2, at 2100–01 (discussing tendencies of firm behavior to create fairness problems for consumers).

⁷⁶ For a similar analysis, see Jason Scott Johnston, *Cooperative Negotiations in the Shadow of Boilerplate*, in *BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS* 12–13 (Omri Ben-Shahar ed., 2007).

dating site. Firms may turn a blind eye to all users who write “acceptable” fibs or slight exaggerations in their online profile. However, some consumers may over-stretch this flexibility, telling blunt lies. Such behavior would be unfair and may very well upset other consumers. Therefore, a firm might tend to apply its strict policy to the latter, while displaying a forgiving attitude to the former. Whether or not information flow regarding this strategy exists, firms are likely to exercise this Gap without fearing reputational damage.

The normative aspects of this form of discrimination are somewhat more complex. Though this practice seems fair and efficient, it might have problematic aspects. Such a practice enables a firm to exercise its power without providing the affected party with due process and without adequate transparency as to the differential treatment.⁷⁷ In addition, at times, actions which seem opportunistic to the firm need not be viewed as such by all consumers or society in general.

E. *The Gap & the Anchoring Effect: Forming a Behavioral Starting Point*

The Gap can provide another advantage for firms: setting a desired starting point. This may be best explained by referring to the anchoring effect. In short, the anchoring effect suggests that when making decisions and forming judgments, people rely too heavily—and irrationally—on the first piece of information or data provided.⁷⁸ For instance, the original price proposed for a used item will significantly influence and shape the rest of the negotiation. This sort of anchoring occurs regardless of the legitimacy of the initial price.

Assume a hotel has an 11:00 AM check-out policy. Further assume that the hotel states in its terms of service (i.e., SFC) that it will charge the client for an additional day should she check out late. The hotel knows that some clients might check out late for reasonable reasons or genuinely by mistake. It does not wish to over-apply this rigid check-out policy; in fact, the hotel is fine with late check-outs as long as they are done by midday. By stating its 11:00 AM check-out policy, the hotel anchors customers. This may minimize check-out lateness, especially problematic cases that occur after midday. If a customer does need to check out late, she is more likely to endeavor to do so as close as possible to 11:00 AM.

⁷⁷ On the problematic aspects of such conduct with respect to large online intermediaries, see Niva Elkin-Koren & Eldar Haber, *Governance by Proxy: Cyber Challenges to Civil Liberties*, 82 BROOK. L. REV. 105, 149 (2016).

⁷⁸ See, e.g., Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974). For more recent studies, see Robyn A. LeBoeuf & Eldar Shafir, *The Long and Short of It: Physical Anchoring Effects*, 19 J. BEHAV. DECISION MAKING 393 (2006); Daniel M. Oppenheimer et al., *Anchors Aweigh: A Demonstration of Cross-Modality Anchoring and Magnitude Priming*, 106 COGNITION 13, 16–17 (2008); Shane W. Frederick & Daniel Mochon, *A Scale Distortion Theory of Anchoring*, 141 J. EXPERIMENTAL PSYCHOL. 124 (2012).

This example shows how contract terms can shape consumer behavior *ex ante*. Yet the anchoring technique may serve companies *ex post* as well. For example, assume a telecom company that sets the price for extra (beyond the customer's plan) roaming data usage at \$100 per gigabyte. The consumer is unaware of this pricing, which is offensively expensive. When an aggrieved consumer complains about the charge, the company might be willing to charge him just \$50. Since the \$100 serves as an anchor, the consumer will be more likely to accept—and perhaps be happy with—the \$50 charge. In both of these cases, firms write their SFCs in a language that affects consumers' behavior, perception, and judgment even though the firm itself does not strictly follow the SFC. While shaping consumer perspective, the Gap allows firms to appear tolerant and cooperative.

However, the anchoring effect requires consumers to be familiar with the relevant contractual terms. Otherwise, of course, no anchoring can occur. Therefore, the anchoring strategy may be effective only with respect to salient terms, of which consumers are aware. These can be important terms which consumers care about *ex ante*. Alternatively, they may be terms that the firm highlights in the contracting process. Yet another alternative refers to terms that interest a consumer once an issue arises *ex post*.

F. *The Doomsday Scenario*

The next motivation for firms to generate a Gap relates to the “doomsday scenario.”⁷⁹ Here we address firms that generally aim to treat their consumer leniently, yet face an urgent, novel, or unpredicted need to change their policy and apply strict SFCs. There are numerous circumstances that may lead firms to cease their deviating conduct and adhere to the strict SFC. Examples may include tight times or unexpected catastrophes,⁸⁰ changes in corporate objectives and policy,⁸¹ or “endgame” situations such as bankruptcy or a hostile takeover,⁸² etc.

As noted, in view of these possibilities, firms would strive to retain the discretion to stiffen their practices without risking breach of contract. Likewise, firms prefer to have the discretion to end the practice of exercising a lenient policy in light of substantial policy or market changes.

Another type of market change may be consumers' desire to switch to a competitor or end a contract. For instance, consider firm A, which provides users with cloud applications and platform services. The firm drafts harsh or one-sided terms of service, which consumers never read. Users typically breach some of these terms without even knowing. Yet firm A repeatedly turns a blind eye towards these breaches. However, when a user informs firm

⁷⁹ Becher & Zarsky, *supra* note 6, at 342.

⁸⁰ A possible example is a massive recall or a colossal product malfunction.

⁸¹ For instance, moving from one market to another.

⁸² Here, the firm is likely to care less about its reputation.

A that she would like to end the contract and transact with firm B, firm A then advises the user that she is in breach of the contract. The firm further threatens—often implicitly—to sue the user should she decide to move to a competitor. Slightly restated, the Gap here serves as a consumer retention tool that may also reduce competition.

Confronted with the prospect of a possible doomsday scenario, firms will employ a cost/benefit analysis before resorting to reliance on such contractual language. That is, they will balance the costs of reputational damage against the short-term benefits of generating additional surplus. In doomsday scenarios, long-term and reputational damages might be of secondary importance. This may explain why resorting to the contractual language might prove to be a sustainable option under such circumstances.

G. *Reducing Transaction Costs*

Another possible incentive for creating a Gap is reducing transaction costs. In the regular course of action, the SFC is very detailed, perhaps delineating when exactly the firm will exercise its rights. However, it would be extremely expensive, perhaps often next to impossible, to address all potential circumstances.⁸³ Consequently, the firm might simply draft its contract in a protective and somewhat harsh fashion while strategically relying on the Gap.⁸⁴ That is, firms may state broadly and one-sidedly their rights, such as terminating a contract or making unilateral changes. At the same time, their interests in maintaining their reputation may still keep the firms in check, incentivizing fair conduct in practice and allowing the firms to exercise maximal flexibility. When faced with unanticipated circumstances, the firm might consider a change in its policy—resorting to the contractual language.⁸⁵

This function of the Gap allows firms to reduce transaction costs while maintaining their discretion regarding unforeseen circumstances. As before, the Gap serves as a type of insurance against unforeseen negative

⁸³ See Bernstein & Volvosky, *supra* note 2, at 131 (employing a similar analysis and noting practices carried out in the shoe manufacturing market).

⁸⁴ For anecdotal and interesting writing discussing somewhat similar cases see Macaulay, *supra* note 2, at 796 (emphasis added) (footnotes omitted) (“Some firms attempt to arm themselves with end-game strategies by placing “heads I win, tails you lose” clauses in form contracts unlikely to be read until trouble arises. Professor Fuller’s 1947 casebook defended such drafting. He noted: “*The practice actually followed in the settlement of claims by companies which employ a standard form for transacting business is often much more liberal than might be inferred from the terms of the contract they ask their customers to sign.*” Fuller continues: “The companies . . . seek a contractual margin of safety within which they can exercise their own discretion free from the threat of litigation” Firms hide loopholes in the fine print, knowing that these terms will not be the subject of negotiations. These terms are used to ward off legal liability by providing bright-line rules. *Rather than having to prove such things as fraud, material failure of performance, or substantial breach, the firm’s lawyers give themselves an easy-to-establish standard.*).

⁸⁵ Cf. Johnston, *supra* note 2, at 858–59 (explaining that “performance terms” can be “expand[ed] upon” but “breakdown terms are not meant to be varied”).

circumstances. Other options to deal with unique and unpredicted circumstances, such as employing broad standards in SFCs, are more problematic. They entail disputes with consumers and litigation risks. At the same time, reverting to the option of providing detailed SFCs to try and cover all possible instances seems unattractive. It entails high drafting costs to the firms, which might be able to roll some of these costs onto consumers.⁸⁶ Consumers will also suffer because reading these documents will result in information overload.⁸⁷ Thus, the Gap allows firms to avoid these problematic outcomes, at least in part, while offering several layers of benefits to consumers.

III. THE GAP IN ACTION

The previous Part pointed out various motivations firms may have to create and utilize a Gap. As demonstrated, firms have substantial incentives to set a lower reference point by drafting one-sided contract terms.⁸⁸ Building on these incentives, this Part analyzes five different scenarios that enrich our understanding as to when the Gap merits legal vigilance. The first test case, addressed in Section A, pertains to instances in which firms generally choose to change policy and revisit SFCs. The other four instances, delineated in Sections B–E, deal with firms' decisions to adhere to SFCs selectively.

A. *Change of Policy: Resorting to the Contractual Language*

The first scenario in which the Gap is present addresses an overall change in the firm's policy across the board. Here, we refer to cases where a firm switches from a lenient approach toward almost all consumers to a strict approach. In doing so, the firm opts to literally follow the terms of the SFC, which are much less liberal than the firm's previous behavior.

Most likely, consumers did not anticipate this change. They did not

⁸⁶ It seems that SFCs in the United States are long and complicated. *See, e.g.*, Clair A. Hill & Christopher King, *How Do German Contracts Do as Much with Fewer Words*, 79 CHI. KENT L. REV. 889, 894 (2004) (opining that American contracts are long and detailing the possible reasons for this feature).

⁸⁷ For more on this issue, see Shmuel I. Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 LA. L. REV. 117, 167–177 (2007); Melvin Aron Eisenberg, *Text Anxiety*, 59 S. CAL. L. REV. 305 (1986); David M. Grether et al., *The Irrelevance of Information Overload: An Analysis of Search and Disclosure*, 59 S. CAL. L. REV. 277 (1986); Korobkin, *supra* note 18.

⁸⁸ By contrast, providing consumers better terms ex ante will create a very different starting point. In such a case, consumers will view these better terms as part of their entitlement. Making a change and degrading the contract is more likely to be realized by consumers as a loss, which may well generate a public backlash. For a discussion on integrating the status quo bias, the endowment effect, and loss aversion into legal analysis, see Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998); Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1232 (2003).

consider it *ex ante*, because no information regarding this type of event (or the firm's actual contractual language) existed. However, from the moment the firm makes the change and acts according to its rigid SFC, information regarding this shift may quickly become public and apparent. Since the change is applied across the board as a general business practice, consumers are likely to discuss it and generate information flows. Nonetheless, firms are sure to predict this future flow of information and strive to preempt or counter it by producing a relevant public relations response where appropriate.

Firms have various motivations for changing their policy and resorting to the contractual language. The central relevant motivation might be a change in a firm's outlook; what we referred to as the "doomsday scenario" in the case of a drastic change.⁸⁹ Yet, it also might be possible that the firm acted in this way to reduce transaction costs; i.e., it adopted an initial broad scope contractually and later amended its actual policies based on various needs and market changes.

The noted changes might focus on various forms of broad contractual provisions that enable conduct modification. Some could pertain to termination clauses. Such changes will take place when the contracts stipulate that the firm may terminate the contract unilaterally. In this scenario, the firm would apply this term to its full extent only when a shift causes the firm to follow its strict contract. Yet, this dynamic can also unfold regarding other contractual rights, such as those pertaining to data collection and usage policy.

To demonstrate, consider the following case in point: Sharon opens an account with a technology company that provides social media services. She chooses a company that is known for taking user privacy seriously. For many years, the company has refrained from using any technology that can track users or gather their information. However, Sharon has never read the firm's terms of service, which state: "We may use cookies and other technologies to track our customers, gather their personal or private information, discover how they use our services, etc."⁹⁰ Sharon, who has been using her account for five years now, learns that the firm has recently changed its practices and decided to extensively collect and use personal data. Upon protesting to the firm, she is referred to the SFC. A similar scenario might unfold regarding the firm's ability to censor and remove content posted by its users.⁹¹

⁸⁹ See *supra* Part II.F.

⁹⁰ General language common to terms of service agreements.

⁹¹ The firm might only selectively remove content, yet have broad authority to do so under its terms of use. This is indeed the situation with Twitter. See Stacey Lantagne, *Twitter's Discretion in Its Terms of Service and the Way We Define Words*, CONTRACTSPROFBLOG (Oct. 13, 2017), http://lawprofessors.typepad.com/contractsprof_blog/2017/10/twitters-discretion-in-its-terms-of-service-and-the-way-we-define-words.html.

At this point, we must establish whether resorting to the contractual language is legitimate, or perhaps the contract is to be understood as having been amended⁹² so as to not allow this policy change. As noted, while engaging in these actions, firms might have both legitimate and illegitimate incentives. If the firm is deterred by negative reputation, its usage of general language to limit costs and enable flexibility can lead to fair and efficient outcomes. Yet, if only insufficient information flows exist, or if the firm is faced with an endgame setting in which it need not care for its reputation, legal intervention might be required. Here, given consumers' lack or paucity of information regarding these new requirements and practices, the outcomes of unilaterally shifting to enforce the actual contractual language might be deemed inefficient and unfair.

To complicate matters further, consider an additional example which involves salient provisions and the Gap. For instance, a firm is contractually obliged to deliver a good within thirty business days, yet is famous for doing so within a week. At one point the firm shifts to deliver within thirty days to all customers, as indicated in its contract. Legal intuition leads to concluding that this situation differs from the one previously noted in its severity. Indeed, when consumer contracts are involved, it should be assumed that contracting parties are familiar with the salient contractual terms at issue, such as price, quality, and often shipment options and details. Therefore, in this latter case, the noted Gap and the possible change that followed should be within the parties' expectations and the risk assumed by the purchaser. Given the clear contractual stipulation, consumers should be responsible for understanding that their shipment might eventually arrive only after thirty days, even if others have received it quicker.

However, unlike this specific example, we usually cannot simply assume that consumers took *all* the relevant risks into consideration *ex ante*, including those indicated in the SFC which conflict with the firm's ongoing practices. At the same time, information flows indicating specific, actual behaviors are rather powerful and enjoy high levels of trust and therefore would most likely be prominently considered. Accordingly, we suggest below that strategic policy changes in conduct which lead to the firm's mere following of its contractual undertakings ought to be scrutinized.⁹³

B. *An "Opportunism Retreat": Selectively Resorting to the Contractual Language*

A firm may selectively and strategically treat *a specific customer*, or a

⁹² This, of course, is closely related to the doctrine of course of performance, which we discuss in more detail *infra* Section IV.B.2.

⁹³ As we detail below, courts should consider a variety of doctrinal tools for that purpose. See *infra* Section IV.B.

set of consumers sharing similar attributes, in a rigid way as detailed in its SFC.⁹⁴ In this scenario, firms initially insert various relatively one-sided terms in their SFC. Yet, they generally do not insist on their rights according to the written language. At some point they might choose to revert to the contractual language, such as when the customer behaves opportunistically.

One example discussed above is the firm's utilization of its broad remedies in situations where users employ "small" inaccuracies in their online dating site profiles.⁹⁵ As mentioned,⁹⁶ these inaccuracies are often met by the provider turning a blind eye towards these contractual breaches. Yet the Gap and the existing contractual framework allow the dating website to "throw the book" at users they suspect have crossed the line, by unilaterally terminating their subscription to the website, effectively banishing them from this digital realm.

Another common example pertains to return policies.⁹⁷ Assume such policy states that clothing items may be returned only if the consumer returns the item: (1) within 48 hours; (2) with the original tag; and (3) with proof of purchase. Further, assume that the store does not insist on all these terms most of the time. Usually, the store allows consumers to return the items even if three or four days have elapsed since the purchase, hence generating goodwill with their customers.

Alan, a regular consumer, notices the firm's overall leniency. In response, he abuses this policy and routinely buys luxurious items every Friday morning, returning them the following Tuesday, at times without the tags. The store observes this pattern of behavior and denies Alan's returns based on its formal return policy. In other words, it flags Alan as an opportunistic consumer and treats him accordingly.

These examples show that oftentimes a firm's selective reliance on contractual language may be both fair and efficient. It prevents unjustified cross-subsidies (between honest and dishonest consumers) and tackles opportunistic or bad faith behavior. Therefore, the law should enable such actions and outcomes. Yet, as we will soon demonstrate, there is a thin line between firms' legitimate practices and those that would be deemed unacceptable.

⁹⁴ Scholars point to this potential occurrence. See Bebchuk & Posner, *supra* note 2.

⁹⁵ *Supra* Section II.D.

⁹⁶ *Id.*

⁹⁷ For an economic and behavioral analysis of cooling-off periods (which are a form of return policy), see Shmuel I. Becher & Tal Z. Zarsky, *Open Doors, Trap Doors, and the Law*, 74 LAW & CONTEMP. PROBS. 63 (2011).

C. *Ex Post Discrimination: Selectively Departing from Contractual Language*

When a firm's deviation from its contractual language is tailored and examined on a case-by-case basis, it could be considered an unacceptable manner of ex post discrimination.⁹⁸ One form of such discrimination may occur in response to a dispute or a problem between the consumer and the firm. In such instances, the firm may provide relief for sophisticated or assertive consumers, as opposed to lay consumers.⁹⁹ Note that in the previously discussed scenarios (such as that addressing return policies) firms *withdraw* from the Gap and present an inflexible attitude to some consumers, as noted in the contract. In this example, however, the firm *employs* the Gap to award informed or otherwise preferred consumers rights and remedies the contract does not feature.

For instance, consider a firm that will forgo a disproportionate charge for roaming data when dealing with assertive and sophisticated consumers.¹⁰⁰ In such cases, firms treat weak consumers stringently (according to the SFC) while evincing lenient treatment for strong consumers that will assuage their complaints and dissatisfaction.¹⁰¹ Whether withdrawing from the Gap or employing it, the questions raised and the balances entailed are almost identical; the forms of ex post discrimination here discussed generate a specter of unfairness. One normative shortcoming of such action is that it generates a distributive effect.¹⁰² Such discriminatory practices transfer wealth from weak consumers (who are not contesting) to sophisticated and informed ones (who do). Therefore, the Gap is more likely to harm consumers with lower-income, less knowledge, and less sophistication.

Here again, consider the implications of enhanced data flows regarding these practices. In many instances, enhancing information flows regarding the existence of such ex post discrimination would undermine their success.¹⁰³ Such flows may heighten the public's and policymakers' awareness and thus restrain firms. The stronger the information flow regarding this matter, the greater the reputational risk that firms may face.

Encouraging information flow as a means to restrain sellers' behavior is an ex ante tool. When ex ante tools prove insufficient, courts may have to

⁹⁸ *Supra* Section II.B. For a detailed discussion, see Cruz & Hinck, *supra* note 67.

⁹⁹ See Johnston, *supra* note 2, at 876 (discussing anecdotal evidence, showing that assertive consumers can negotiate virtually everything).

¹⁰⁰ See *supra* Section II.B for an example.

¹⁰¹ For example, firms may devise a statistical model to find and target the consumers with the weakest voices.

¹⁰² Here, we assume that distributive considerations are relevant to private law. For an interesting discussion, see Daphna Lewinsohn-Zamir, *In Defence of Redistribution Through Private Law*, 91 MINN. L. REV. 326 (2006),

¹⁰³ See Becher & Zarsky, *supra* note 6, at 360–65 (detailing various measures to achieve this).

consider ex post measures. Below we suggest that courts should be vigilant and suspicious when scrutinizing the Gap in situations featuring these forms of discrimination, especially where there is no information flow that may discipline sellers.

In this context as well, sometimes the firm may not be too wary about information flow that documents ex post discrimination. This can be the case in instances where the firm would want to incentivize consumers to actively shift towards the group receiving preferable treatment. Consider an airline that makes use of latent contractual provisions which allow it to overbook flights and remove passengers from them at its own discretion. It is often suspected that airlines choose to invoke the contractual language towards “regular” consumers when needed, while retaining its loyal customers on the plane—thus treating them leniently.¹⁰⁴ In such cases, the airlines (or other relevant firms) might encourage the flow of information about such practices and alleged preferences. Such a flow can motivate many other consumers to join the airline loyalty program—a move which is likely to generate additional income for the airlines.¹⁰⁵ While these cases seem upsetting, perhaps they might not be considered as unfair if these ground rules were known to and sufficiently internalized by all parties when purchasing the airline ticket.

D. *Gaming Information Flow: Selectively & Randomly Using the Contractual Language*

Relatedly, the fourth state in which firms can utilize the Gap is by exploiting only a segment of random consumers. Firms will selectively adhere to the written SFC (or conversely choose to diverge from it) in a certain number of cases, regardless of the consumers’ nature. Here, the selection would be carried out at random, as opposed to previously discussed schemes which strive to identify a specific profile of consumers. With other customers, firms will use the Gap, display leniency, and ease their business and legal interaction. The incentives for doing so could be varied, mostly related to the greater surplus which could be derived from adhering to the SFC (as opposed to exhibiting a lenient behavior). For instance, a hotel might decide to charge a random tourist a hefty fee for checking out late if it usually provides its services to one-shot players.¹⁰⁶

From the firm’s perspective, the idea would be to exploit a limited

¹⁰⁴ See Benjamin Zhang, *How Airlines Like United Choose Who to Kick Off a Flight*, BUS. INSIDER (April 10, 2017), <http://www.businessinsider.com/how-airline-choose-who-kick-off-flight-united-american-delta-2017-4>. For simplicity reasons we assume that no laws, regulations, or treaties govern this case.

¹⁰⁵ Of course, the company has to balance this with the risk of alienating consumers who are not, and will not become, loyalty club members.

¹⁰⁶ Just as a quick illustration, that may be the case with a hotel that is located in a remote tourist area, where people usually do not visit more than once.

number of consumers. The exact number depends on the extent and nature of the information flow that the firm's behavior generates. That is, firms will aim to exploit consumers as long as their complaints and voices are unheard or insignificant. If the number of aggrieved consumers is below a certain threshold, their opinions will be dissolved in the general information flow.

We are unaware of solid evidence that points to such strategic practices. However, we believe it may be relevant where the firm has a strong enough incentive to exploit a small number of random consumers *ex post*. While this practice intuitively seems unfair and unacceptable, explaining why requires some additional work. The practice leads to unfair outcomes, as random yet equal consumers are treated differently.¹⁰⁷ Yet the law rarely intervenes in the arbitrary actions of private parties. It may do so, at least in some jurisdictions, when the firms discriminate on the basis of unacceptable criteria such as race or gender. However, this is not the case here.

One possible doctrine to consider in such cases is the doctrine of "bad faith."¹⁰⁸ It should also be noted that consumers subjected to this random form of discrimination are unaware of that risk when entering the contractual relationship. Thus, they suffer from a type of information asymmetry—which market forces cannot overcome—when entering the transaction.¹⁰⁹

In addition, such behavior may harm consumers' liberty.¹¹⁰ Employing Professor Zamir's terminology, "a regime that grants firms unlimited power to treat customers as they please adversely affects the latter's liberty."¹¹¹ Assuming consumers have the right to be treated fairly, subjecting them to random strict treatment seems to compromise their "status as autonomous and free subjects."¹¹²

E. *Politics and Citizenship: Selectively Enforcing Contractual Language*

The final scenario relates to a situation in which a firm selectively withdraws from the Gap (rather than utilizing it). Firms sometimes may prefer to end "Gap practices" with respect to specific customers for reasons which go beyond the motivations discussed thus far. These motivations can include external causes, political pressure, and public demand. Interestingly,

¹⁰⁷ See Ronen Perry & Tal Z. Zarsky, "May the Odds Be Ever in Your Favor": *Lotteries in Law*, 66 ALA. L. REV. 1035, 1044 (2015) (discussing the fairness aspects of random selection processes).

¹⁰⁸ See, e.g., U.C.C. §§ 1-203, 2-305(2), 2-306(1), 2-311(1), 2-615(a) (AM. LAW INST. & UNIF. LAW COMM'N 2012) (detailing the obligation to perform a contract in good faith).

¹⁰⁹ The analysis changes, however, if individuals clearly understand and accept the chance of being subjected to random mistreatment *ex ante*. In such cases it becomes imperative to inquire whether individuals are nevertheless likely to miscalculate the risks involved, for instance, due to cognitive biases such as over-optimism.

¹¹⁰ See ZAMIR & TEICHMAN, *supra* note 20, at 312 (explaining that liberty is harmed in a regime in which one party has an unlimited license to treat the other as it pleases).

¹¹¹ Zamir, *supra* note 2, at 2101.

¹¹² *Id.*

this may be the case when a firm chooses to apply its “Gap discretion” to another firm rather than consumers.

One interesting example pertains to Amazon’s famous 2010 decision to terminate its cloud server contract to host WikiLeaks. This unilateral measure, which received a good deal of media attention,¹¹³ was made possible by the very broad language in the various provisions of the SFC that Amazon used for hosting. Such provisions prohibited the usage of the hosting services for materials the client did not have rights to, as well as materials that might have been harmful to third parties.¹¹⁴ Amazon itself admitted that many of its clients store “controversial” content on their servers, yet decided to take specific action against Wikileaks.¹¹⁵ In this case, however, Amazon chose to terminate its contract after yielding to public and political pressure, most notably after senior U.S. Senators intervened.¹¹⁶ Arguably, it did so to protect its brand, or possibly out of fear of future governmental retaliation.

In a way, this scenario can be viewed as a form of the “opportunism retreat” (i.e., the second scenario). In both contexts, the firm seeks to use the SFC’s language to deal with a problematic contracting party *ex post*. Moreover, in both cases the firm often has the incentive to encourage the information flow on the matter. Information flow will enhance the firm’s reputation and protect its public image.

Nonetheless, this is a unique case of a change in the firm’s contractual policy which justifies a separate analysis. The previously discussed scenario involved a customer who causes *direct* financial burdens or losses to the firm. Yet in this scenario, the burden or loss is indirect and results from a negative externality. That is, WikiLeaks’ behavior in and of itself does not affect Amazon. However, it allegedly caused harm to others, and these others, in turn, may see Amazon as the source of their harms. As a result, these third parties—which as this case demonstrates could be quite powerful—might contemplate measures against Amazon. Amazon, therefore, will strive to limit their exposure by retreating to the actual

¹¹³ See, e.g., Ewen MacAskill, *WikiLeaks Website Pulled by Amazon after US Political Pressure*, GUARDIAN (Dec. 1, 2010), <https://www.theguardian.com/media/2010/dec/01/wikileaks-website-cables-servers-amazon>; Charlie Savage, *Amazon Cites Terms of Use in Expulsion of WikiLeaks*, N.Y. TIMES (Dec. 2, 2010), <http://www.nytimes.com/2010/12/03/world/03amazon.html>.

¹¹⁴ See Rachel Slajda, *How Lieberman Got Amazon to Drop WikiLeaks*, TALKING POINTS MEMO (Dec. 1, 2010, 12:56 PM), <https://talkingpointsmemo.com/muckraker/how-lieberman-got-amazon-to-drop-wikileaks> (describing Amazon’s terms of acceptable use as prohibiting content that “may be harmful to [its] users, operations, or reputation”).

¹¹⁵ Benjamin M. Farrand, *Regulatory Capitalism, Decentered Enforcement, and its Legal Consequences for Digital Expression: The Use of Copyright Law to Restrict Freedom of Speech Online*, in *THE GOVERNANCE OF ONLINE EXPRESSION IN A NETWORKED WORLD* 59 (Benjamin Farrand & Helena Carrapico eds., Routledge 2016).

¹¹⁶ See Slajda, *supra* note 114 (describing the personal intervention of U.S. Senator Joe Lieberman as a key factor in Amazon’s decision to cut off Wikileaks).

contractual language.

The scenarios also differ in terms of their normative outcomes. In the previously discussed second scenario (involving opportunistic consumers), the firm's policy to follow the contractual terms enhances overall efficiency and fairness. In the current case, however, the firm's decision is often controversial and possibly unfair. It might even lead to substantial negative externalities. For instance, it can reasonably be argued that Amazon's conduct in the WikiLeaks case is harmful to public discourse, free speech, and democracy in general.¹¹⁷ In other words, the steps taken silenced an important voice. Although Amazon's actions seem to be well-grounded within the four corners of the contract, such actions may have had far-reaching consequences. Furthermore, Amazon's policy was carried out without providing due process or allowing its client an opportunity to justify or correct its steps.

This final example may indicate interests and considerations that go beyond those of consumer protection, efficiency, liberty, and fairness. It introduces another perspective that illustrates why the firm's ability to employ a Gap can be both intriguing and problematic. This further supports the need to provide a framework for better tailoring the legal responses, which will be the focus of the next Part.

IV. THE GAP IN LAW & POLICY

The previous parts pointed to the Gap and demonstrated that relying on a system solely premised on information flows and reputation can be fickle. The less severe the reputational risks and related ramifications the firm faces, the more likely it is to use the Gap at its discretion. With that in mind, this Part explores the Gap's implications. Empirically, the Gap may explain some findings in the literature relating to consumer contracting behavior. Doctrinally, recognizing the Gap is essential for crafting a more sensitive and up-to-date judicial approach to key issues in consumer contract law.¹¹⁸

A. *Empirical Findings & the Gap*

Acknowledging the Gap is vital in answering some of the most crucial questions related to the laws that govern SFCs; i.e., how much consumers know about their contracts. As we have repeatedly noted, it is clear that almost no one reads SFCs. Despite significant online information flows, it is still unclear how much valuable information is available to consumers. It

¹¹⁷ Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle Over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311, 340 (2011) ("The fact that the same effect was sought to be achieved through a public statement by an official, executed by voluntary action of a private company, suggests a deep vulnerability of the checks imposed by the First Amendment in the context of a public sphere built entirely of privately-owned infrastructure").

¹¹⁸ For a similar assertion, see Bernstein & Volvosky, *supra* note 2, at 132–36.

is very challenging to determine the quality of information flowing to consumers and whether it is indeed partial or being manipulated. Finally, it is also difficult to establish what use consumers make of such information. In short, it is hard to determine whether such flows provide a mitigating force that may discipline sellers.

One possible approach is to compare the bias of SFCs to the form of information available online regarding the corresponding products and services. In fact, a study attempted to do just that,¹¹⁹ using empirical tools to critically examine and question the existence of an online information flow.¹²⁰ Interestingly, it concluded that there is no meaningful correlation between a contract's biases and the product's ranking on leading websites.¹²¹ On the basis of these findings, the author of that study pointed to several potential weaknesses in the theory of online information flow. Indeed, based on these findings one can easily deduce that the existence of such a flow most likely cannot serve to substitute regulatory intervention.

However, such a conclusion does not seem to account for the Gap. Once we bear in mind the existence of the Gap, it is easy to see why these findings do not necessarily indicate the lack of an online information flow, the paucity of effective consumption of such information by consumers, or even the need for regulation. This is because the previously discussed study examined contract biases and product ranking. But the Gap teaches us that online rankings and data flows would most likely reflect the firm's behavior, rather than the language of the contracts. Thus, properly measuring the accuracy and effectiveness of online flows requires evaluating and comparing firms' conduct and practice—all while accounting for the Gap.¹²²

B. *The Gap Analysis: Policy Framework and Recommendations*

In this Section, we detail our recommendations for minimizing the

¹¹⁹ Nishanth V. Chari, *Disciplining Standard Form Contract Terms Through Online Information Flows: An Empirical Study*, 85 N.Y.U. L. REV. 1618, 1621 (2010).

¹²⁰ The methods of inquiry and statistical datasets are closely related to the work of Bakos et al., *supra* note 3.

¹²¹ In some contexts, a negative correlation between biases and ranking was shown. Chari, *supra* note 119, at 1622.

¹²² In recent years, an abundance of marketing studies has examined the relationship between online ratings and the actual quality of products. See, e.g., Bart de Langhe et al., *Navigating by the Stars: Investigating the Actual and Perceived Validity of Online User Ratings*, 42 J. CONSUMER RES. 817 (2016) (suggesting that consumers overly trust online ratings, which are not in line with actual products quality as reflected in "Consumer Reports"). For a discussion and critique of these findings, see Robert V. Kozinets, *Amazonian Forests and Trees: Multiplicity and Objectivity in Studies of Online Consumer-Generated Ratings and Reviews*, A Commentary on de Langhe, Fernbach, & Lichtenstein, 42 J. CONSUMER RES. 834 (2016); Itamar Simonson, *Imperfect Progress: An Objective Quality Assessment of the Role of User Reviews in Consumer Decision Making*, A Commentary on de Langhe, Fernbach, & Lichtenstein, 42 J. CONSUMER RES. 840 (2016); Russell S. Winer & Peter S. Fader, *Objective vs. Online Ratings: Are Low Correlations Unexpected and Does It Matter?* A Commentary on de Langhe, Fernbach, and Lichtenstein, 42 J. CONSUMER RES. 846 (2016).

problems associated with the Gap. First, we consider ex ante tools that may encourage information flows and assist in mitigating some of the Gap-related concerns articulated above. Second, we sketch a judicial framework for Gap-related cases.

1. *Ex Ante Tools: Encouraging Information Flows & Strengthening Reputational Information*

The existence of the Gap can, in some cases, undermine the accuracy of the information flow to individuals regarding the content of SFCs. In others, the Gap is structured in a way that sidesteps relevant information flows. In any event, full and accurate information regarding both market practices and contractual language would prove helpful and important in the hands of consumers. Effective and accurate information flows—presented in a friendly way that is easy for consumers to absorb—would enhance market dynamics and potentially reduce the role of regulators and courts. Accordingly, regulatory measures should be taken to enhance such flows.

In some of the instances noted above, the Gap is applied to distort information flows. This is the case when firms provide beneficial treatment to opinion leaders. In other situations, firms apply the Gap and, as a result, benefit from insufficient feedback loops. This occurred in scenarios “C”¹²³ and “D”,¹²⁴ where the firm applied the Gap generally, yet fell back to the contractual language selectively or randomly.

Clearly, greater knowledge regarding these dynamics via information flows would prove beneficial in countering the Gap’s shortcomings. It would either deter firms from manipulating the gap or educate consumers about its existence. Therefore, regulatory steps to promote information flows might be helpful to mitigate both sets of problems.¹²⁵

As in other contexts, promoting high-quality information flow faces three main challenges. The first is over-production of some forms of information. This occurs when relatively few consumers generate a large amount of information, disproportionate to the group’s size and representativeness. Assume, for instance, that a firm treats only twenty percent of its customers in a preferable, lenient way. Over-production of information might mean that these twenty percent of satisfied consumers produce significantly more than twenty percent of the reviews relating to

¹²³ See *supra* Section III.C.

¹²⁴ See *supra* Section III.D.

¹²⁵ It is worth noting here that such knowledge may not always suffice. In this context, one possible concern to consider is that consumers will over-optimistically assume that they will be treated leniently. Thus, consumers may underestimate the risk that they will be subjected to under the harsh SFC. See generally Neil Weinstein, *Optimistic Biases about Personal Risks*, 246 SCI. 1232 (1989) (proposing a number of theories to explain pervasive optimistic bias in comparative risk judgement).

this firm.¹²⁶ Therefore, some measures must be applied to adjust the information flow to properly reflect the experience of the broader population.

The second challenge in the advent of high-quality information flows is under-production of information. This challenge mirrors the foregoing one, as it is concerned with consumers who do not post reviews and feedback, and therefore are underrepresented. In our context, it might refer to consumers who do not benefit from easy access to the Internet (e.g., elderly or poor consumers). Alternatively, it might relate to consumers without the time or availability to express and share their experiences. Then again, it may refer to consumers who simply lack the sufficient incentives to post their impressions and thoughts. This may be the case when a consumer has had an average experience,¹²⁷ when he is embarrassed to share his experience, or when he believes that no one will gain much from his review.¹²⁸

Interestingly, another group of consumers who might not share their feedback are those who wish to post negative reviews. Some of these consumers might fear personal liability lawsuits, whether or not such reviews are protected under the Consumer Review Fairness Act of 2016.¹²⁹ Many others may receive redress by using firms' complaint and settlement departments,¹³⁰ making the posting of online complaints less desirable.

Notably, the response to all these problems and concerns might be aligned with general policies striving to promote digital literacy and overcome the digital divide in society. Yet another set of responses will be policies and measures set out to hamper the progression of lawsuits against individuals opining on a firm's conduct.¹³¹ A subset of this issue, for instance, pertains to the move by some firms to block negative reviews by including provisions forbidding the writing of such reviews in their SFCs. Indeed, recent legislation has moved to counter this problematic dynamic by

¹²⁶ Employing the famous Pareto principle (20/80 rule) we might assume that these twenty percent of consumers will produce eighty percent of the reviews. Of course, it may well be that the twenty percent of the most aggrieved consumers will generate disproportionately negative reviews. However, this does not pose a problem since if these consumers voice their complaints, they do not create a Gap; they eliminate it. Moreover, in light of firms' ability to engage in effective ex post discrimination, this is less likely to be the case.

¹²⁷ For a discussion on the importance of this phenomenon, see Yonathan Arbel, *Contract Enforcement and Reputation* (forthcoming 2019) (on file with authors).

¹²⁸ For example, the 10,000th review of a local restaurant is likely to have a rather marginal value.

¹²⁹ Pub. L. No. 114-258, 130 Stat. 1355 (2016).

¹³⁰ For a detailed analysis, see Van Loo, *supra* note 70.

¹³¹ This could be done in a variety of ways, such as rendering the revealing of the anonymous speaker difficult by setting a high bar of proof or upholding jurisdiction and choice of law clauses that impede on such claims. See, e.g., *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 234–35 (E.D. Pa. 2007) (upholding a choice of law clause); *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 770 S.E.2d 440, 444 (Va. 2015) (setting a high bar of proof).

prohibiting such provisions.¹³²

The third obstacle for the formation of high-quality information flow is not related to representativeness. Rather, it is the need to minimize the distribution of inaccurate information. Here, the main concern is that sellers can tamper with feedback and reviews. One distortion may take the form of an agreement to manipulate the way reviews are presented. For example, review platforms and firms might conspire to post the most positive reviews first. As an additional strategy, a seller might hire individuals to write up fake positive reviews referring to false transactions—a practice referred to as “astroturfing.”¹³³ Furthermore, firms may pay individuals for positive reviews, or offer them discounts and other rewards.

By and large, consumer review platforms are currently subjected to limited regulation and even benefit from substantial immunity from liability.¹³⁴ It is unlikely this situation will change anytime soon.¹³⁵ Yet this does not mean that nothing can be done to improve data flow.

Indeed, a few steps and developments are noteworthy in this context. First, online platforms can—and do—launch litigation against dishonest or false reviewers. For instance, Yelp has reportedly sued businesses for allegedly providing fake reviews.¹³⁶ Similarly, Amazon is reportedly fighting fake reviews by suing businesses that offer “glowing reviews in exchange for cash.”¹³⁷ Amazon has even sued sellers who use its platform “for using sock puppet accounts to post fake reviews about their

¹³² See Eric Goldman, *Understanding the Consumer Review Fairness Act of 2016*, 24 MICH. TELECOMM. & TECH. L. REV. 1, 2 (2017) (discussing recent legislation banning restrictions on negative reviews).

¹³³ Cecilia Brainard, *Are Online Reviews Reliable? (Or Understanding Astroturfing)*, HUFFPOST (May 27, 2016, 11:55 AM), https://www.huffingtonpost.com/cecilia-brainard/are-online-reviews-reliab_b_10153912.html. This has allegedly happened in some markets. For instance, firms in China have reportedly paid powerful search engines, such as Baidu, to receive higher rankings. Jun Mai, *Baidu Ordered to Change How It Operates by China’s Internet Watchdog After Death of Student*, S. CHINA MORNING POST (May 9, 2016, 7:20 PM), <https://www.scmp.com/news/china/policies-politics/article/1942912/baidu-ordered-change-how-it-operates-chinas-internet>. On another important platform, sellers used artificial transactions that could facilitate false reviews. Gillian Wong, ‘Cat-And-Mouse Game’: Alibaba Exec on Fake Transactions, WALL ST. J. (Mar. 3, 2015, 7:24 PM), <https://blogs.wsj.com/chinarealtime/2015/03/03/cat-and-mouse-game-alibaba-exec-on-fake-transactions/>.

¹³⁴ See 47 U.S.C. § 230 (2012) (establishing protection for online platforms from liability for third-party content). This implies that websites can collect and publish consumer reviews without the fear of legal liability.

¹³⁵ For a different opinion and call for change, see Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1149 (2018).

¹³⁶ Zac Johnson, *Writing Fake Reviews on Yelp? You Might Get Sued!*, YAHOO, <https://smallbusiness.yahoo.com/advisor/writing-fake-reviews-yelp-might-sued-173135209.html>.

¹³⁷ Sarah Perez, *Amazon Cracks Down on Fake Reviews with Another Lawsuit*, TECHCRUNCH (Apr. 26, 2016), https://techcrunch.com/2016/04/26/amazon-cracks-down-on-fake-reviews-with-another-lawsuit/?_ga=2.103061504.1052706140.1524411755-1857616339.1524411755.

products.”¹³⁸

Second, consumer organizations and enforcement bodies also join the effort to combat fake reviews. The FTC and some states are currently channeling more attention and resources to targeting and fining sellers that encourage or pay for fake reviews.¹³⁹ These efforts responded to the revelation that firms are using sophisticated means to disguise the deceptive nature of said reviews.¹⁴⁰

Third, there are several technological strategies that strive to minimize the phenomenon and effect of fake reviews. One uses software that may spot fake reviews.¹⁴¹ Another is the limiting of reviews only to those reviewers who use the online platform to purchase and pay for the goods or services they consume.¹⁴² Relatedly, some online review sites include social platforms that facilitate the creation of a trusted community which enables the identification of reliable reviews.¹⁴³

An additional attempt to improve reputational information flow would encourage consumer organizations or the FTC to issue and release objective reviews. These reviews, which can also compare contractual language and firms’ behavior, would be incorporated into firms’ ratings and reviews. Such reviews may influence sellers’ reputations, improve the flow of information about SFCs’ quality, and thus incentivize firms to better tailor contract language and actual behavior. Some consumer organizations already have solid experience in aggregating consumer complaints.¹⁴⁴ This data can serve as a good starting point and be supplemented and advanced by direct

¹³⁸ Kate Conger, *Amazon Sues Sellers for Buying Fake Reviews*, TECHCRUNCH (June 1, 2016), <https://techcrunch.com/2016/06/01/amazon-sues-sellers-for-buying-fake-reviews/>.

¹³⁹ See, e.g., Mike Blumenthal, *Car Dealers Fined \$3.6 Million for Fake Reviews & Deceptive Practices*, GATHERUP (Mar. 27, 2017), <https://gatherup.com/blog/car-dealers-fined-3-6-million-fake-reviews-deceptive-practices/> (reporting on the FTC’s crackdown on fake reviews); Julie Bort, *New York Attorney General Busts 19 Companies for Writing Fake Yelp Reviews*, BUS. INSIDER (Sept. 23, 2013, 4:23 PM), <https://www.businessinsider.com/new-york-cracks-down-on-fake-yelp-reviews-2013-9> (reporting New York’s fining of nineteen companies for astroturfing).

¹⁴⁰ See *id.* (explaining how SEO companies game the system).

¹⁴¹ E.g., FAKESPOT, <https://www.fakespot.com> (last visited Aug. 16, 2018).

¹⁴² For a media report on this, see Kevin May, *Goodbye TripAdvisor, Welcome to Verified Reviews on Expedia*, TNOOZ (Dec. 28, 2011), <https://www.tnooz.com/article/goodbye-tripadvisor-welcome-to-verified-reviews-on-expedia/>.

¹⁴³ Amazon, for instance, develops a culture of “super reviewers” and even features a “Reviewer Hall of Fame.” *Amazon’s Top Customer Reviews*, AMAZON, <https://www.amazon.com/hz/leaderboard/hall-of-fame> (last visited Aug. 16, 2018). For a discussion of this dynamic, see Justine Sharrock, *What It’s Really Like to be an Amazon Super Reviewer*, BUZZFEED NEWS (Oct. 31, 2013, 4:42 PM), https://www.buzzfeed.com/article/justinsharrock/what-its-actually-like-to-be-an-amazon-super-review?utm_term=.utL6kMDrp#.noaj6oOMl.

¹⁴⁴ One notable example is the Consumer Financial Protection Bureau, which runs a consumer complaints database. *Consumer Complaint Database*, CONSUMER FIN. PROTECTION BUREAU, https://www.consumerfinance.gov/data-research/consumer-complaints/search/?from=0&searchField=all&searchText=&size=25&sort=created_date_desc (last visited Sept. 6, 2018).

governmental funding. It may also be supported by indirect subsidies to NGOs and civil society groups carrying out these tasks.

2. *Ex Post Tools: Judicial Intervention in Gap Cases*

Generally, in the context here discussed, courts should step in only as a last resort, where reputation is an insufficient motivator for disciplining firms. When market forces and reputational mechanisms are indeed insufficient, firms may be tempted to apply the Gap in an unacceptable manner. In such instances, judicial intervention may be warranted.

Following this reasoning, the first judicial task is to consider whether there is a good information flow that reflects the firm's actual behavior. Where there is insufficient information flow—in quality or quantity—courts should consider whether a Gap exists and, furthermore, whether it has led to problematic outcomes.¹⁴⁵

As noted, firms have various motivations to generate and apply a Gap. While some motivations are acceptable, others might be questionable and worth scrutiny. Since it might be problematic to identify the exact motivation for employing a Gap, we suggest that courts examine the situation and surrounding circumstances. As illustrated above,¹⁴⁶ the context in which the Gap has been exercised may shed important light on firms' motivation.

For example, if the firm exercises strict behavior only with opportunistic consumers, courts should be reluctant to intervene. Upholding the Gap against opportunistic or bad-faith players may often be a fair and efficient strategy, although distributive and liberty concerns may still exist.¹⁴⁷ It should also be assured that the seemingly opportunistic individuals are, however, provided with an adequate ability to voice their opinion or challenge the decision at stake.

When considering legal intervention, the courts' toolkit comprises a range of doctrines and principles. Under some circumstances, manipulating the Gap may be considered to be "bad faith" behavior. Reliance on provisions which have not been applied in the past might undermine basic notions of fairness.¹⁴⁸ Furthermore, under relevant circumstances courts might determine that some contractual provisions at stake are unconscionable. For instance, provisions (which were not exercised)

¹⁴⁵ See Becher & Zarsky, *supra* note 6, at 357–60 (discussing factors that courts should consider before intervening to improve the information flow).

¹⁴⁶ For a detailed discussion of possible negative consequences, see *supra* Part II.

¹⁴⁷ See *supra* notes 107–13 and accompanying text (cautioning against random infliction of strict treatment on online users, which can adversely impact those users' liberty).

¹⁴⁸ See Benkler, *supra* note 117, at 368–69 ("The most direct path to such a cause of action would be to argue an implied contractual obligation not to unreasonably, or without good faith, withhold service.").

providing firms with broad and unilateral termination rights could be considered imbalanced and therefore struck down. However, such doctrinal tools might be overbroad and inject a considerable degree of uncertainty to markets and contractual relationships. For these and other reasons, courts might be reluctant to apply them.

Another specific doctrine, “reasonable expectations,” has been adopted and employed mainly in insurance cases.¹⁴⁹ If employed in our context, consumers might argue that firms’ lenient treatment (as opposed to the one-sided SFCs) vis-à-vis other consumers has shaped their “reasonable expectations.” Therefore, if firms revert to the contractual language, it may violate such expectations.

Of course, determining what should be considered a reasonable expectation is not easy.¹⁵⁰ A reasonable expectation should be based, at least in part, on an inquiry as to whether an effective information flow exists and whether this flow reflects the contract or the firm’s behavior. Here, the firms will try and argue that the expectations must reflect the contractual language, and that other data sources are unreliable. Firms are also likely to argue against the application of this doctrine to new contexts beyond insurance markets. Thus, applying this doctrine would be an uphill battle as well.

Another potential doctrine is that of “usage of trade,” which refers to a general practice regularly observed, creating a legitimate expectation to be followed.¹⁵¹ As the others, this doctrine is not a panacea. In situations in which firms engage in discrimination of specific consumers, the doctrine might not provide relief. This is because the specific treatment may be related to chosen consumers (or a group of consumers) rather than a general practice. However, where there is a general change in the firm’s practice (as discussed above with respect to Scenario A),¹⁵² the Gap might indicate and

¹⁴⁹ According to this doctrine, “[i]n dealing with standardized [consumer] contracts courts have to determine what the weaker contracting party could legitimately expect by way of services according to the enterpriser’s ‘calling,’ and to what extent the stronger party disappointed reasonable expectations based on the typical life situation.” *Gray v. Zurich Ins.*, 419 P.2d 168, 172 (Cal. 1966) (quoting Friedrich Kessler, *Contracts of Adhesion*, 43 COLUM. L. REV. 629, 637 (1943)); see also *Darner Motor Sales, Inc. v. Universal Underwriters Ins.*, 682 P.2d 388, 394–95 (Ariz. 1984) (en banc) (upholding a similar formulation of the reasonable expectations doctrine).

¹⁵⁰ For an interesting proposal, see Ayres & Schwartz, *supra* note 4, at 559–60. Another possibility might be to use neuro-science findings that can reveal what consumers actually think. Cf. Mark Bartholomew, *Neuromarks*, 103 MINN. L. REV. 521 (2018).

¹⁵¹ See U.C.C. § 1-303(c) (AM. LAW INST. & UNIF. LAW COMM’N 2017) (defining a “usage of trade” as “any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question”); see also Uri Benoliel, *The Course of Performance Doctrine in Commercial Contracts: An Empirical Analysis*, 68 DEPAUL L. REV. (forthcoming) (defining a “usage of trade [as] a general practice having regularity of observance in commerce”); David McGowan, *Recognizing Usages of Trade: A Case Study from Electronic Commerce*, 8 WASH. U. J.L. & POL’Y 167, 167 (2002) (discussing the definition of a “usage of trade”).

¹⁵² *Supra* Section III.A.

reflect a change in trade practices. In such cases, and based on the “usage of trade” doctrine, consumers might be able to rely upon this new conduct, as opposed to the contractual language.

Another noteworthy judicial tool is to declare that the terms of the contract have changed in light of the firm’s behavior, while invoking the “Course of Performance” doctrine.¹⁵³ In such a case, and relying on this doctrine, courts could close the Gap and modify the agreement along the lines of the firm’s actual actions. Here, contract law has accepted the notion that contract terms may be modified by the parties’ behavior, adding new obligations and privileges.¹⁵⁴ Accepting such changes will, in turn, protect reasonable reliance and expectation.¹⁵⁵

Interestingly, in some states this doctrine enables contract modification even if the original contract included a “No Oral Modification” clause, which clearly stipulated that all amendments must be made in writing.¹⁵⁶ This additional doctrinal step is important in our context, as without it, SFC drafters can easily include a “No Oral Modification” provision in their agreements. If “No Oral Modification” clauses trump, firms applying them will sidestep much of the discussion to follow and render the “Course of Performance” doctrine moot.

Before proceeding, it is important to note that there are several strong general arguments against the application of the “Course of Performance” doctrine. Yet, there are also reasonable counterclaims in our context. First, one might argue that the firm’s conduct does not reflect the way it intends courts to interpret its contract. Therefore, performance alone should not lead to contract modification.¹⁵⁷ For contract interpretation, the firm expects courts to rely on the precise text used in the written contract. Simply put, according to this argument courts should be mostly reluctant to apply the doctrine, which goes against the contractual language and against the parties’ intentions.

We concede this argument may carry weight in business-to-business commercial contexts: situations where two informed parties enter a contract after negotiating over its content. However, the argument fails in the business-to-consumer realm, where consumers do not read their standardized contracts. Here, one can hardly argue that consumers have agreed that the SFC will trump future modifications and constitute the final document to be considered by courts.

¹⁵³ Benoliel, *supra* note 151, at 4.

¹⁵⁴ *Id.* at 6.

¹⁵⁵ *Id.* at 10 n.31; Omri Ben-Shahar, *The Tentative Case Against Flexibility in Commercial Law*, 66 CHI. L. REV. 781, 787 (1999). Another reason for introducing this doctrine is that it leads to the reflection of the parties’ intention. Given the context of SFCs, this justification is relatively weak.

¹⁵⁶ Benoliel, *supra* note 151, at 14–15, 17–18; *see also* Ben-Shahar, *supra* note 155, at 791 (noting that opting out of these modification rules is often not simple).

¹⁵⁷ Benoliel, *supra* note 151, at 11 (referring to Schwartz & Scott, *supra* note 20, at 592).

The second often-voiced concern regarding the application of this doctrine is that accepting the “Course of Performance” doctrine will incentivize firms to act rigidly. That is, firms will be reluctant to exercise flexibility throughout the contractual relationship even though such flexibility is efficient,¹⁵⁸ knowing that such a behavior will later backfire in court.¹⁵⁹ While this general claim has merit, our analysis above presented the various nuanced motivations guiding firms when deciding whether to generate a Gap. Therefore, some motivations to nonetheless provide flexibility will still persist. Furthermore, and as noted, “flexibility” is too broad a term to encapsulate the firm’s conduct here. Flexibility might lead to substantial, various detriments for consumers. Therefore, this general argument of promoting flexibility should be here replaced with the elaborate discussion this Article provided; including the need to factor in the various facets and dimensions of online information flows.

Notably, the “Course of Performance” doctrine works well in the case of Scenario A,¹⁶⁰ where the firm changed its overall strategy and behavior. However, one may wonder how courts should approach instances in which the consumer has no history of a firm’s performance, or that the firm has chosen to selectively treat a specific consumer rigidly (as opposed to others, who are receiving lenient treatment). This specific consumer can hardly claim the firm’s course of performance towards him led to contract modification. Thus, to fit the paradigm at hand, the doctrine itself must be modified.

This brings us to an important facet of our suggested approach towards the “Course of Performance” doctrine. Here, we suggest that when applying this principle in Gap cases, courts should factor into their analysis firms’ behavior towards third parties. We opine that when a firm acts in a certain way vis-à-vis *specific* consumers, this behavior may also set the tone for the relation, or “performance,” between the firm and *other* consumers. Slightly restated, firms’ conduct towards their customers can legitimately shape other consumers’ expectations and reliance: the crucial elements that this doctrine aims to protect. This is all a result of the information flows addressed above.

At the procedural level, proving the presence of a Gap in court or to a

¹⁵⁸ See Ben-Shahar, *supra* note 155, at 784 (discussing how the “‘rigidity effect’ might frustrate the Code’s objective of encouraging flexibility”).

¹⁵⁹ *Id.* at 13 (referring to Lisa Bernstein, *Merchant Law in a Modern Economy*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 238 (Gregory Klass et al. eds., 2014) and Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996)). For a critique of this basic argument and a presentation of a more sophisticated version of it, see Ben-Shahar, *supra* note 155, at 787. The literature on this issue also includes additional reasons to refrain from applying this doctrine, such as the high litigation costs it might entail, as well as the firms’ costs to monitor their employees, whose actions might now generate liability and lead to contract modification. These are, no doubt, substantial costs which must be balanced by the courts when considering the application of this doctrine in “Gap”-like situations.

¹⁶⁰ *Supra*, Section III.A.

regulator may be challenging.¹⁶¹ It would be very difficult for a consumer to prove that an overall shift from the contractual language has taken place.¹⁶² It is also challenging for an individual to go beyond her limited interaction with the firm and seek records and evidence. Therefore, most often consumers should not be expected to provide information as to how a given firm interacts with other consumers. Slightly restated, due to these information asymmetries, placing the burden of proof on consumers to prove a Gap was created and possibly abused will often be unfair and can lead to the failure of their case. To prevent this, courts can employ presumptions to shift the burden of proof onto firms.

Since firms control information as to their actions, they can easily dispel unsubstantiated claims regarding the creation of a Gap. Such a presumption can be used (and a shift in the burden applied), for instance, when a firm employs harsh, one-sided terms while its online reviews and reputation are excellent. In addition, the burden might be shifted if a substantial amount of reviews regarding the firm's behavior contradict the contractual language. This might indicate the existence of a Gap, and a practice which may fall within one of the contractual doctrines noted above. In these cases, firms might be required to prove they indeed treat all their consumers the same.

To conclude, courts have a variety of tools to explore and employ in Gap cases. Additional possible doctrines may include unfair surprise, estoppel, and a ban on selective enforcement. As this Article takes the first steps in sketching out a new framework, an in-depth analysis of all these doctrines is beyond its scope. We hope to undertake such an analysis in the future, once the theoretical and doctrinal foundations of our proposal develop.

C. *Shortcomings, Limitations, and Potential Obstacles*

Before concluding, it is important to detail three main shortcomings, limitations, and potential obstacles in our analysis. The first issue is a limit to its scope. Our analysis addresses classic SFCs (or SFC provisions) that consumers do not read. In such cases, information flow may substitute reading in the context of disciplining sellers. Where the Gap exists, information flow may not generate the necessary pressure to restrain sellers and encourage them to draft fair SFCs.

However, it is imperative to note instances where consumers *are* likely to read their SFCs rather than relying on information flows. In some relatively rare instances—such as book contracts, real-estate contracts and

¹⁶¹ Cf. Benoliel, *supra* note 151, at 14–15 (making a similar point with regards to the “course of performance” doctrine).

¹⁶² In some instances, this might not be very difficult, as consumers could point to the actual reviews they have read. However, these reviews have not been written by the firm and might not be available after the fact. For that reason, additional analytical steps detailed below are required.

day-care agreements—consumers (or their lawyers) tend to read SFCs (or part of them).¹⁶³ Where consumers read their SFCs, they may become familiar with their content via reading—rather than via information flows. And where consumers are not lured or manipulated by the Gap, our analysis does not hold, and requires some tinkering.¹⁶⁴

The second problem that may arise from our recommendations is the enhancement of ex ante discrimination. If sellers lose the ability to discriminate among their customers ex post, they may be more motivated to engage in ex ante discrimination. For instance, firms may be more tempted to use big data and employ sophisticated online segmentation. That is, they may seek to regain their ability to provide different consumers different treatment, by profiling consumers ex ante and providing different consumers with different contractual terms.¹⁶⁵ In other words, firms will strive to discriminate in any event, and eliminating the Gap will merely shift discrimination to other realms—perhaps to those society finds to be worse.

Our response to this concern has several layers. First, it should be acknowledged that firms already engage in ex ante discrimination.¹⁶⁶ Thus, it is doubtful whether eliminating ex post discrimination will make things worse. Second, ex ante discrimination is potentially more transparent and might therefore—at least in some circumstances—be less harmful than ex post discrimination practices (such as those facilitated by the Gap). When firms engage in ex ante discrimination, consumers might not know that they are being discriminated against. However, they can become aware of the terms they are actually offered (that is, even if these terms are worse than

¹⁶³ See Becher & Unger-Aviram, *supra* note 34, at 212–13 (distinguishing car rental, laundry, day-care, and bank account SFCs).

¹⁶⁴ In addition to the analysis here noted, courts may still review one-sided terms in consumer contracts using other doctrines and principles. Such doctrines and principles are not necessarily dependent on—or related to—whether the consumer has read, or had the opportunity to read the form contract at stake. In many jurisdictions, such as Germany, New Zealand, and Israel, courts are vested with the discretion to examine and nullify suspicious terms. See, e.g., Standard Contracts Law, 5742-1964, §§ 3–5, 17, (1982) (Isr.) (granting Israeli courts and a special tribunal the authority to annul or change disadvantageous terms in standard form contracts); Fair Trading Act 1986, ss 26A, 46H–46M (N.Z.) (granting New Zealand courts the authority to declare that a term in a standard form consumer contract is an unfair term and detailing the consequences of said declaration). For Germany's broad application of "fairness control" to standard form contracts, see Thomas Zerres, *Principles of the German Law on Standard Terms of Contracts* 12–17, available at www.jurawelt.com/sunrise/media/mediafiles/14586/German_Standard_Terms_of_Contract_Thomas_Zerres.pdf.

¹⁶⁵ Cf. Oren Bar-Gill, *Algorithmic Price Discrimination: When Demand is a Function of Both Preferences and (Mis)perceptions*, 86 U. CHI. L. REV. (forthcoming). Generally speaking, the same tactics that vendors have utilized for price discrimination might also be in play for other sorts of discrimination. For instance, some stores may engage in return policy discrimination by not allowing returns for consumers from some areas, identified, for example, by their residential zip code.

¹⁶⁶ Allesandro Acquisti et al., *The Economics of Privacy*, 54 J. ECON. LIT. 442, 446–47 (2016); see also Natasha Singer, *The Government's Consumer Data Watchdog*, N.Y. TIMES, May 23, 2015, at BU3 (quoting Google's chief economist).

the terms granted to other consumers). Consumers may be able to review those terms, or more likely—learn about those terms via online information flows—and hence make relatively informed decisions. At the same time, ex post discrimination of the kind discussed here is neither transparent nor predictable. Due to the Gap, consumers cannot know at the time they enter the agreement if they will be subject to lenient or harsh policies later on. This, as we noted, also harms their autonomy and liberty. Third, we opine that since ex ante discrimination may indeed pose a problem, stronger enforcement of rules against ex ante discrimination should indeed be explored.¹⁶⁷

The last possible concern with our thesis is excessive litigation. As noted, consumers do not typically hold the relevant information relating to the Gap, so the Gap may be hard to prove. Moreover, even once proven, sellers' motivations may be hard to determine as well. This implies that proving a Gap and its allegedly unfair consequences and implications may involve costly litigation. This carries its own costs for the parties involved and for the public more generally. For that reason, the key to solving this matter would also involve introducing unique procedural measures. As we delineated above,¹⁶⁸ shifting burdens in suspicious instances may an important step in that direction.

CONCLUSION

Courts and legislators have long been struggling to determine which contractual provisions in SFCs should not be enforced. In this Article, we suggest a new approach that might assist policy makers to form a more holistic, updated approach. While doing so, we illustrate how digital realities, online peer-to-peer information flows, consumer standard form contracts, and firms' conduct interact.

Traditionally, contract law has assessed the fairness of the contractual language in isolation, without looking into the parties' behavior. This behavior vis-à-vis the contractual language is assumed to be relevant mainly with respect to doctrines such as breach of contract, estoppel, or bad faith. Contract law also insists on drawing a line between pre-contract and post-contract stages. Our analysis blurs these lines and demonstrates why this distinction cannot always hold. Furthermore, post-contract behavior regarding one group of consumers can influence pre-contract decisions of another group.

Consumer markets are elaborate mazes, and some of the information

¹⁶⁷ For a discussion of a similar balance of interests between ex ante discrimination and the protection of privacy interests, see Lior Jacob Strahilevitz, *Privacy Versus Antidiscrimination*, 75 U. CHI. L. REV. 363, 371 (2008).

¹⁶⁸ See *supra* note 162 and subsequent text.

sets they feature amount to consumer mousetraps. To avoid such traps, our analysis offers two main lessons. First, the Gap is not an innocent phenomenon but one that calls for close scrutiny. In the context of consumer assent to SFCs, much of the literature focuses on the way *consumers* make decisions, form preferences, and behave. However, we suggest attributing much more attention and importance to *firms'* behavior *ex post*.¹⁶⁹ Therefore, regulating behavior in the context of SFCs should not be confined to behaviors that amount to unfair contracting practices, deceptive behavior, or breach. It should also encompass the nuanced implications of “good,” lenient behavior.

Second, online information flow is a two-sided coin. On the one hand, high-quality information flow conveys important information intuitively and smoothly. For that reason, it can advance consumer protection and reduce the need for legal intervention. On the other hand, the Internet changes accepted notions of social trust while creating new forms of trusted parties. As a result, firms might be tempted to tinker with this reality and exploit it unfairly. In our context, self-interested firms can manipulate information flow by utilizing the Gap.

In such cases, information flow can aggravate the problem of information asymmetry, rather than cure it. It can lead consumers to form a distorted perspective, which in turn will result in sub-optimal decision making. The traditional concern of asymmetric information relates to consumer form *contracts*. We, however, suggest that paying close attention to asymmetric information in firms' *behavior* is frequently a crucial point not to be missed.

¹⁶⁹ See Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745, 1777–78 (2014) (exploring whether highlighting firms' behavior changes the way we view consumers' behavior, responsibility, and blame).